

THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

Editor.

W. L. WELDON, *Barrister-at-Law.*

Reporters.

PRIVY COUNCIL ... ... J. V. WOODMAN, *Barrister-at-Law.*

HIGH COURT, BOMBAY ... ... B. N. LANG, *Barrister-at-Law (Retired).*
KENNETH McI. KEMP, *Barrister-at-Law (Acti*
H. S. CHATFIELD, *Barrister-at-Law.*
GANGARAM BAPSOBA RELE, *Vakil, High Cour*
RATANLAL RANCHHODDAS, *Vakil, High Court.*

VOL. XXXVI.

1912.

Published under the Authority of the Governor General in Coun

BY

THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY
THE CURATOR OF GOVERNMENT BOOKS, NORTH-WESTER PROVINCES AND OUDH;

AND

THE SUPERINTENDENT OF GOVERNMENT PRINTING, BENGAL.

JUDGES OF THE HIGH COURT.

Chief Justice.

THE HON. SIR BASIL SCOTT, *Kt.*
,, ,, NARAYANRAO CHANDAVARKAR, *Kt.* (*Acting*).

Puisne Judges.

THE HON. MR. L. P. RUSSELL (*Retired*).
,, SIR NARAYANRAO CHANDAVARKAR, *Kt.*
,, MR. S. L. BATCHELOR.
,, SIR DINSHA D. DAVAR, *Kt.*
,, MR. F. C. O. BEAMAN.
,, ,, J. J. HEATON.
,, ,, N. C. MACLEOD.
,, ,, G. S. RAO (*Additional*).

THE HON. MR. T. J. STRANGMAN (*Advocate-General*).
,, ,, M. R. JARDINE (*Acting*).
MR. P. E. PERCIVAL (*Legal Remembrancer*).
,, L. GRAHAM (*Acting*).

TABLE OF CASES REPORTED.

(I. L. R. 30 Bombay.)

PRIVY COUNCIL.

ORIGINAL CIVIL.

APPELLATE CIVIL.

TABLE OF CASES CITED.

A

		Page
Aloji v. Secretary of State for India ..	(1893) 22 Bom., 670	327
Abdul Kadir v. Baboo Hurree Mohun ...	(1874) 6 N.-W.-P. H. C. R., 201...	45
Abhiram Goswami v. Shyama Charan Nandi	(1909) L. R. 36 I. A., 148 ...	149
Adelphi Bank v. Edwards	(1882) 26 Sol. J., 360	459
Adrishappa v. Gurushidappa	(1880) 4 Bom., 494; L. R. 7 I. A., 162	651
Advocate-General v. Katmali	(1903) 29 Bom., 133	228
Ahraiji v. Mahamalji	(1899) 1 Bom. L. R., 218... ...	552
Ainsworth v. Wilding . .	[1896] 1 Ch., 673	79
Ajubhai Rawabhai v. Bai Hiraba ...	(1896) P. J., p. 327	633
Allen v. Manning	(1825) 2 Add., 490	225
Ambabai kom Balaji Vinayak Kale v. Ramchandra Balaji Kale	(1895) P. J., p. 44	133, 387
Amolak v. Dhondi	(1906) 30 Bom., 4?6	03, 541
Anwari Begam v. Nizam-ud-din Shah ...	(1898) 21 All., 165	229
Aravamudu Ayyangar v. Samiyappa Nadan .	(1897) 21 Mad., 385	269
Ardesir Bejonji Surti v. Syed Sirdar Ali Khan	(1908) 33 Bom., 610	503
Arnold v. Cheque Bank	(1876) 1 C. P. D., 578	470
Arunachala v. Ayyavu	(1884) 7 Mad., 318	282
Attorney-General v. Birmingham, Tame and Rea Drainage Board ...	(1881) 17 Ch. D., 685	286
———— v. Fellows	(1820) 1 J. & W., 254	171
———— v. Ironmonger's Company .	(1840) 2 Beav., 313	171
Attorney-General for Trinidad and Tobago v. Eriche	[1893] A. C., 518	211
Aubboyessury Dabee v. Gouri Sunkur Panday	(1895) 22 Cal., 859	285
Aulia Bibi v. Ala-ud-din	(1906) 28 All., 715	226

B

Babaji Parshram v. Kashibai	(1879) 4 Bom., 157	552
Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee	(1867) 12 Moo. I. A., 1	650
Bai Baiji v. Bai Santok	(1894) 20 Bom., 53	227
—— Devkore v. Lalchand Jivandas ...	(1894) 19 Bom., 790	273
—— Diwali v. Patel Bechardas	(1902) 26 Bom., 445	227
—— Mahkor v. Bulakhi Chaku	(1874) 1 Bom., 533	633
—— Rukhmani v. Keshavlal	(1907) 9 Bom. L. R., 1293 ...	426

H

I

J

K

APPELLATE CRIMINAL.

TABLE OF CASES CITED.

A

B

F

G

H

I

J

K

L

M

R

W

Y

Z

GENERAL INDEX.

AGREEMENT TO SELL—*Agreement by defendants 1 and 2 to sell property to plaintiff—Subsequent sale by the same defendants to defendants 3 and 4—Suit by the plaintiff for an order to execute a registered sale-deed and for possession—Burden of proof on defendants 3 and 4 to show that they were purchasers for value and* bonâ fide *and without notice.*] Defendants 1 and 2 having agreed to sell their property to the plaintiff, they subsequently sold the same property to defendants 3 and 4.

In a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property.

Held, confirming the decree awarding the claim, that defendants 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants 3 and 4 were bound to show three things, namely, that (1) they were purchasers for value and (2) *bonâ fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed.

One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge.

Himatlal Motilal *v.* Vasudev Ganesh ... ... (1912) 36 Bom. 446

Page

AWARD—*Land—Compulsory acquisition—Compensation—Award by Assistant Judge—Appeal to the District Judge—Second appeal—Practice—Civil Procedure Code (Act V of 1908), secs. 96, 100—Land Acquisition Act (I of 1894) secs.* 53, 54.

See Civil Procedure Code 360

which is not addressed to any ... *to payment of forged cheque by banker—Effect of* ... *imate cause of payment.*] The plaintiffs were a Banking Corporation with ... ad office at Lahore and branch offices at Amritsar and elsewhere. The defendants were a Banking Corporation having a branch at Bombay.

In 1904 the plaintiffs opened a current account with the defendants and sent the defendants a list of the officers of the plaintiffs authorized to sign for the plaintiffs, including the name of Madho Ram, the manager of the Amritsar office. Madho Ram had acted on occasions previous to this date as the manager of the *Lahore* office.

It was the custom of Madho Ram when *leaving* the bank premises for a short time both when acting as manager at Lahore and afterwards *when* manager at Amritsar to leave with the accountant blank *drafts* and blank letters of advice ready signed by him for use as occasion occurred. These drafts were not destroyed after his return.

On the 2nd of October the defendants cashed a draft presented to them for payment for Rs. 10,000 purporting to have been signed by Madho Ram. The defendants had previously received a letter of advice also purporting to have been signed by Madho Ram. The defendants debited the plaintiffs with the payment.

The plaintiffs repudiated the draft as a forgery and sued to recover *Rs.* 10,000 from the defendants.

The defendants denied that the draft was a forgery. In the alternative they submitted *that* the forged draft had been paid by them owing to the negligence *of* the plaintiffs, and that the *latter* were not entitled to recover the amount of the dra ... them.

... was one left by Madho Ram when acting as man ... s, but that the plaintiffs were not estopped from conten ... not the draft of the plaintiffs.

... that it was not incumbent on the plaintiffs to contemplate *the* ... forgery or theft and that the negligent act of ... being cashed by the defendants, ... ver.

Societe Generale v. *The Metrop* ... 27 L. T 849, *Swan* v. *North British Australasian Company* (1863) ... J Exch. 273, *Smith* v. *Prosser* [1907] 2 K. B. 735 and *Baxendale* v. *Bennett* (1878) 3 Q. B D. 525, followed.

Panjab National Bank, Limited v. The Mercantile Bank of India, Limited ... ... (1911) 36 Bom. 455

BETROTHAL OF DAUGHTER—*Legal necessity—Widow—Alienation.*

See Hindu Law 88

BOMBAY DISTRICT POLICE ACT (BOM. ACT IV OF 1890), SEC. 43—*District Magistrate—Order for prevention of disorder—Promulgation of the order—Presence of the Magistrate at the place when the order is promulgated*—Ultra

Page

Held, further, that *Essa Jacob* v. *Municipal Commissioner of Bombay* (1900) 25 Bom. 107 is no longer an authority since the amendment of the Act in 1905.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v MUNCHERJI PESTONJI. (1911) 36 Bom. 405

BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888 AS AMENDED BY ACT V OF 1905), SECS. 379, 379A—*Overcrowding of house—Notice to abate the nuisance—Service of notice—Owner—Rooms in a building let to different*

The notice contempla-
Bom. Act III of 1888)
the owner has let rooms

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MATHURADAS ... (1911) 36 Bom. 81

OM

The pleader in the mofussil is not merely an advocate—he is the confidential

exclusive attention to the interests of the client throughout any proceedings in which he is engaged.

In winding up proceedings, a single pleader must not represent two different creditors whose interests are known to conflict.

A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings.

A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with under the disciplinary jurisdiction for making them. It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected.

Held, overruling the contention, that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI. ... ... (1912) 36 Bom. 606

BUILDING—*Application to Municipality to reconstruct a house, building balconies—"Permission Note" to rebuild the house—Permission to build balconies indefinitely delayed—Building of balconies—Indefinite delay inconsistent with the District Municipal Act (Bom. Act III of 1901).*

See DISTRICT MUNICIPAL ACT 61

Page

CANTONMENT TENURE—*Cantonment Code of* 1836 *and* 1850*—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment, claim to—Presumption of ownership—Possession, effect of—Right of Government to resume land.*] In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment, the Government as plaintiffs claimed that the land belonged to them, and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon. The defendants claimed the land as their private property on the ground that their predecessors-in-title were owners of the land at the time the cantonment was established, and that nothing had happened since to vest the title in the Government; and while admitting that they were subject to military jurisdiction, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees They [illegible]

based on a document dated 27th August 1864 by which one Beyts, a Purser in the [illegible]

compensated for the change in their position as owners to that of licensees; (2) that from the Regulations as summarised in Aitchison's Cantonment Code of 1836 and Jameson's Cantonment Code of 1850, it was clear that, though permission to [illegible]

sale of the house so built,.

Page

It was therefore impossible to say that mere possession or occupation of the bungalow on this site afforded any presumption whatever that the defendants or their predecessors-in-title were owners in fee. The presumption was all the other way, and was strengthened by an examination of the history of the site itself which showed that the defendants' predecessors-in-title did not regard the property as differing in its tenure and terms from other property in the cantonment. The defendants were, therefore, mere licensees and the land had been lawfully resumed by Government.

KAIKHUSRU ADERJI v. SECRETARY OF STATE FOR INDIA ... (1911) 36 Bom. 1

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 13, 462—Res judicata—*Consent decree—Lands—Tenants-in-common paying land revenue jointly to* [illegible] Minor— [illegible] plea [illegible] ment [illegible] de to [illegible] ween [illegible] r the profits thereof were. The previous suit was decided in terms of a compromise. A minor was a party to it. The guardian of the minor had applied to the Court stating that he had no objection to keep all *the lands* joint *provided the minor* got his share of the profits; and the Court had made the endorsement that the application had been allowed and filed in the suit:

Held, overruling the plea, that the arrangement settling the relations between Government and the tenants-in-common could not be regarded as determination of the relations between the tenants *inter se*.

Held, further, that the decision in the previous suit was passed in the terms of a compromise, but there was no issue raised and no adjudication on the issue whether the village was impartible.

Held, also, that the Court's sanction had not been obtained, under section 462 of the Civil Procedure Code (Act XIV of 1882), to the compromise to which a minor was a party.

that not must tom. d to public policy.

Vinayak Waman Jhosi Rayarikar v. *Gopal Hari Joshi Rayarikar* (1903) L. R. 30 I. A. 77, followed.

PIROJSHAH BHIKAJI *v.* MANIBHAI NICHHABHAI ... (1911) 36 Bom. 53

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 26—*Joinder of parties.*

See CIVIL PROCEDURE CODE (ACT V OF 1901), SEC. 11 207

——— SECS. 263, 264, 318, 319—*Civil Procedure Code (Act V of 1908), Order XXI, rule 5 (2)—Court-sale—Symbolical possession* ... *possession—Limitation.* purchaser at a Court-sa judgment-debtor where is not in the occupancy

Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Gopal v *Krishnarao* (1900) 25 Bom. 275 and *Mahadeo v. Parashram Bhavanchand* (1900) 25 Bom 358, overruled.

MAHADEV SAKHARAM *v.* JANU NAMJI HATLE ... ... (1912) 36 Bom. 373

——— SECS. 287, 293—*Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default*

Page

COMPANY—*Internal defects in management of a limited Company—Innocent party not affected thereby—Principal and agent—Fraud of agent in withholding information from principal—Principal not affected by notice to agent in such case—Absolute undertaking to execute a mortgage on specified property on the happening of a particular contingency—Effect of such undertaking as giving a charge over the property on the occurrence of the contingency.*] By a mortgage of the 15th April 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs. Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he appointed one Dani, his munim in Bombay, as such nominee.

In June 1907 the defendants borrowed three lacs on a cash credit opened with the Bank of India for one year from June 11th, 1907. The said transaction was made conditionally on the defendants giving an undertaking not to further charge the property previously mortgaged to the plaintiff and a resolution to that effect was passed at a meeting of the defendants' directors at which Dani was present. No letter of undertaking was in fact given.

The loan from the Bank of India was renewed at the end of the year for another year. The Bank made some attempt to obtain a higher rate of interest, but in the end the loan was renewed at the same rate as before.

In 1909 the defendants failed to pay the said loan to the Bank of India when due. Finally the said loan was renewed for three months on further security being given on June 30th, 1909.

On August 5th, 1909, the defendants applied to the plaintiff for a further advance of five lacs of which two lacs were required urgently on the security of the said property mortgaged to the plaintiff. The plaintiff consulted Dani who [illegible]

[illegible]

Articles of Association of the defendants.

Thereafter the plaintiff decided to make the proposed advance and signified his intention to the defendants

A formal deed of charge was prepared but not executed owing to the insolvency of the defendants and other circumstances.

On August 10th the plaintiff for the first time received notice of the resolution of the defendants in favour of the Bank of India.

The plaintiff had the receipt passed in his favour by the defendants stamped as a charge on land and registered.

On September 17th the defendants were declared insolvent and Mr. R. D. Sethna was appointed liquidator. As such liquidator he was ordered to sell the mortgaged property and hold the sale-proceeds subject to the amount due to the plaintiff.

The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs. The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale-proceeds for two lacs and interest and for payment of that sum.

[illegible]

[illegible]

Held, further, that the receipt given by the defendants to the plaintiff amounted to an unconditional undertaking to execute a deed of further charge in favour of the plaintiff on the happening of a future event, namely, on the plaintiff

Page

FOREIGN TERRITORY—*Conspiracy at Cambay—Consequent forgery committed in British India—Trial in British India of the foreigner who conspired to forge at Cambay and who was in Cambay when the forgery was committed in British India—Jurisdiction—Penal Code (Act XLV of* 1860), *secs* 34, 109, 467.

See PENAL CODE 524

FORFEITURE—*Forfeiture by Government of Deshgat Inam lands—Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title*] The plaintiff's ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855. The lands were in 1856 forfeited by Government; but the mortgagee was continued in possession and paid assessment in respect of the lands to Government. In 1901, the plaintiffs sued to redeem the mortgage. The defendant contended that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant

Held, that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government; and that it did not deprive the plaintiff of all right and title to the lands, and extinguish the relation of mortgagor and mortgagee which existed between the parties.

Vishnoo Trimbuck v. *Tatia* (1863) 1 Bom. H. C. R. 22 and *Gangabai* v. *Kalapa Dari Mukrya* (1885) 9 Bom. 419, followed.

Held, also, that the defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun.

GURBASAPPA *v.* RANGO VENKATESH ... ... (1912) 36 Bom. 539

FORFEITURE OF OCCUPANCY—*Non-payment of assessment—Re-grant to fresh occupants—Restoration of holding to original occupant—Collector, powers of—Bombay Land Revenue Code (Bom. Act V of* 1879), *secs.* 56, 214, *rules* 32, 62, 68.

See LAND REVENUE CODE, BOMBAY 91

FORGERY—*Abetment of forgery—Abetment by conspiracy—Conspiracy at Cambay, foreign territory—Consequent forgery committed in British India—Trial in British India of the foreigner who conspired to forge at Cambay and who was in Cambay when the forgery was committed in British India—Jurisdiction—Penal Code (Act XLV of* 1860), *secs.* 34, 109, 467.

See PENAL CODE 524

FRAUD—*Fraudulent transfer of possession—Reversioner getting into possession from an alienee of the widow—Mortgage by alienee—Suit for foreclosure—*

cover

t was

that

Held, that H having obtained possession of the property by colluding with defendants Nos. 1 and 2, his fraud was sufficient in law to deprive him of the right

Page

... whose mother the adopter could ... cases of a daughter's son, a ...

Ramchandra v. *Gopal* (1908) 32 Bom. 619, followed.

A person can validly adopt the son of his mother's brother.

YAMNAVA *v.* LAXMAN BHIMRAO ... ... (1912) 36 Bom. 533

HINDU LAW—*Inheritance—Wife—Unchastity during coverture—Condonation by husband—Husband and wife.*] Under Hindu Law, a widow is not disqualified from inheriting to her husband on the ground of her unchastity during coverture, if it is condoned by her husband.

Where the husband and wife have lived together, without any open breach of marital relations up to the husband's death, it would be a dangerous principle to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture.

GANGADHAR PARAPPA *v.* YELLU ... ... (1911) 36 Bom. 138

... *her is limited* ... Under Hindu ... a limited estate *for life.*

All the women who belong to a family by marriage, not by birth, take a limited estate in the property which they inherit from any male member of that family.

DHONDI *v.* RADHABAI ... ... (1912) 36 Bom. 546

—————*Minor—Capacity to make will—Indian Majority Act (IX of 1875), sec. 3.*] A Hindu minor, who has not attained majority as provided in the Indian Majority Act, 1875, is not competent to make a will of his or her property.

BAI GULAB *v.* THAKORELAL ... ... (1912) 36 Bom. 622

—————*Mitakshara—Mayukha—Stridhan—Devolution—Daughter's sons take severally and not jointly—Coparcenary—Basic notion of coparcenary—Obstructed and unobstructed succession—Estate by partition—Estate by birth—Dayada—Rikkta—Interpretation—Self-acquired property.*] Property inherited by sons from their mother is not a joint estate but a tenancy-in-common, according to both the Vyavahara Mayukha and the Mitakshara.

The basic principle of a joint tenancy or coparcenary under Hindu law explained.

A joint tenancy is property inherited as an unobstructed succession and is called *rikkta*. It devolves on the heirs as a coparcenary.

A tenancy-in-common is property inherited as an obstruction and is called *samaribhaga*, because when the inheritance falls in, it devolves on the heirs as a divided estate.

The term *self-acquired property*, as distinguished from *joint property*, explained.

Property originally self-acquired, because acquired without detriment to joint ancestral estate, becomes joint when it has been mixed with and treated as part of the said joint estate by the coparceners.

BAI PARSON *v.* BAI SOMLI ... ... (1912) 36 Bom. 424

Page

HINDU LAW—*Office of hereditary priest*—Yajman vritti—Nibandha—*Caste can* ... *Removal of priest not allowed* ... *tion II of* 1827— ... hereditary priest ... ditary rights of immoveable property.

... a *family, owes its* ... a grant from the ...

Where the office is one of hereditary family priest, the *mere* fact that in any individual case it has been created originally by the caste for the purposes of families belonging to it cannot affect it, because the office carries with it a hereditary right in the nature of property, and the incumbent cannot be deprived of it by anyone, unless he has become a *patita (outcaste)* or has declined to officiate. The caste in such a case makes the selection for the families of its members; and when any ... hereditary family priest, custom annexes to the ... rights as against the family, which ... annul except on the ground of some offence under the Hindu ... y the officiator, or of refusal by the officiator to discharge his duty as family priest.

Where a caste has appointed a man to a mere priestly office, there is doubtless no ... *or removal is exclusively within the* ...

GHELABHAI GAVRISHANKAR *v.* HARGOWAN RAMJI ... (1911) 36 Bom. 94

——————*Right of way*—*Impartible property*—*Presumption of law*—*Implied reservation of right of way on partition of estate*—*Mitakshara*— ... ng to show that at the ... ne other exclusively, the ... after the partition. That ... party who alleges that the ... tted to him exclusively as his share.

... rights of way and ...

them by law, having regard to the nature of ...

NATHUBHAI DHIRAJRAM *v.* BAI HANSGAVRI ... ... (1912) 36 Bom. 379

——————*Rights to well and water*—*Indivisible rights*—*Presumption*—*Partition of property which is joint.*] Under Hindu Law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal; and, after partition, these must be enjoyed by the separated co-parceners by turns.

GOVIND ANNAJI *v.* TRIMBAK GOVIND ... ... (1910) 36 Bom. 275

——————Stridhan—*Deceased Hindu maiden*—*Competing heirs*—*Father's sister*—*Father's male gotraja sapindas five or six degrees removed*—*Preference to father's sister.*] In the case of a deceased Hindu maiden leaving surviving her her father's sister and her father's male *gotraja sapindas* five or six degrees removed, her *stridhan* goes to her father's sister in preference to his said male *gotraja sapindas*.

TUKARAM *v.* NARAYAN RAMCHANDRA ... ... (1912) 36 Bom. 339

Page

HINDU LAW—*Suit for partition—Decree for father's personal debt not illegal or immoral—Decree to be enforced by sale in execution of the entire family estate*

filed suits to enforce their mortgages.

Held, that a decree for a personal debt of the father not illegal or immoral might be enforced by sale in execution in his life-time of the entire family estate.

Meenakshi Naidu v. *Immudi Kanaka* (1888) L. R. 16 I. A. 1, followed.

DATTATRAYA VISHNU *v.* VISHNU NARAYAN ... ... (1911) 36 Bom. 68

———————*Vyavahara Mayukha—Succession—Step-sister—Paternal uncle—Priority.*] According to Hindu Law, as administered under the Vyavahara Mayukha, the half-sister of the propositus is entitled to succeed in preference to his paternal uncle.

TRIKAM PURSHOTTAM *v* NATHA DAJI ... ... (1911) 36 Bom. 120

———————*Widow—Alienation—Legal necessity—Performance of pilgrimage—Betrothal of daughter.*] Under Hindu Law, the expenses incurred by a Hindu widow in performing pilgrimage or in the betrothal of her daughter constitute legal necessity.

As regards pilgrimage, the question in every case must be whether it was for the spiritual benefit of her husband ... the performance of her duty to his soul, and
rega
custc
beliefs and usages.

GANPAT VALAD DHAKU *v.* TULSIRAM ... ... (1911) 36 Bom. 88

———————*Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose.*] Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal.

A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere, unless she leaves the house for an improper purpose.

Ambabai kom Balaji Vinayak Kale v. *Ramchandra Balaji Kale* (1895) P. J., p. 44, followed.

Girianna Murkundi Naik v. *Honama* (1890) 15 Bom. 236, referred to.

PARWATIBAI *v.* CHATRU LIMBAJI ... ... (1911) 36 Bom. 131

———————*Widow—Right to maintenance—Grant of arrears—Exigencies of the case.*] By Hindu Common Law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies.

The grant of arrears of maintenance depends on the wants and exigencies of the widow as proved in each particular case.

RANGUBAI *v.* SUBAJI RAMCHANDRA ... ... (1912) 36 Bom. 383

———————*Will—Trust created by will—Trust coming into being at a future date—Duty of heirs to carry out the trust—Civil Procedure Code (Act XIV of 1882), sec. 539—Trust for public religious purpose—Dedication of property as shivarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction.*] Where a Hindu who has directed a trust of his property for a religious purpose dies before giving effect to it, the Hindu law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser.

Page

Page

without the production of a Mahajan's "*Majur*", and that the defendants were in any event entitled to credit for the sale proceeds of the wreck and cargo.

Held, that an agent who has authority from his principals, express, implied or ratified, can effect insurances on the goods of his principals, that the custom of the port of Cutch Mandvi must be construed in a reasonable manner and that under it a Mahajan's "*Majur*" could not be required in the case of total loss; that the policy-holder's duty was only to give intimation of total loss, at the earliest possible opportunity, to the insurer, and that it was for the insurer to protect his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo.

Ransordas Bhogilal v. *Kesrising Mohanlal* (1863) 1 Bom. H. C. R. 229, referred to.

————*Forgery—Abetment of forgery—Abetment by conspiracy—Conspiracy at Cambay, foreign territory—Consequent forgery committed in British India—Trial in British India of the foreigner who conspired to forge at Cambay and who was in Cambay when the forgery was committed in British India—Indian Penal Code* (*Act XLV of* 1860), *secs.* 34, 100, 467.] The accused was a subject of the Cambay State. He lived there and traded with his business partner A. He conspired with A at Cambay and sent A to a professional forger at Umreth (a place in British India) with instructions to instigate the latter to forge a valuable security. To facilitate the forgery, the accused sent his *khata* book with A. In pursuance of A's instigation the forgery was committed at Umreth. On these facts, the accused was charged, in a Court in British India,

account in his books of this property as trust property. On the 26th October 1886 a second son, the plaintiff, was born to J. P. whereupon J. P. being desirous of providing for this second son, desired to vary the terms of the deed of the 7th of January 1886 and to resettle the same so that his two sons should share equally. A draft deed of declaration of new trusts was accordingly prepared by J. P.'s attorneys and on the 24th of July 1887 was finally settled and approved by J. P. An engrossment was thereupon made and duly stamped but on taking the engrossment to J. P. for his execution on July 29th it was found that owing to an error of the engrossing clerk several pages of it were missing. Another engrossment was prepared forthwith but on the same day before the new engrossment was ready J. P. died. *The plaintiff thereupon brought a suit to have it* declared whether or not the deed of 1886 was a valid deed and prayed that the defective execution of the second deed might be aided by the Court and the provisions of the said second deed declared to be valid.

Held, (1) That the plaintiff was not time-barred as against the trustees from bringing the action.

(2) That, however, restricted the gift was *in form* to J. P. it was in effect a gift absolute to him for life, and that entirely irrespective of the power of revocation.

(3) That all the gifts in the trust settlement made contingent upon N. M dying without issue were bad.

(4) That that portion of the instrument which purported to create a *wakf* in respect of four-tenths of the settled property was bad and void.

(5) That the gift was bad for want of contemporaneous delivery of possession.

(6) That this was a case, if ever there was a case, in which the Courts might act upon those principles which have always guided the Courts of Equity in England and aid defective execution of a power, defective not through any fault on the part of the person intending to execute it but by reason of an act of God, and that the unsigned deed ought to be effectuated by the Court to the extent of making it binding on the conscience of the trustees.

Per Curiam:—It is only in the event of the trusts or some of them being bad that the question of limitation can arise. For if a trust-deed in its entirety is good, *then of course effect must be given to it irrespective of any question of lapse* of time.

Where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by trespass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed *in itself is good and valid to the extent of passing* the legal estate but the trusts declared are in themselves wholly or partially bad, then there is a resultant trust to the author of the trust and the possession of the trustees, whatever they might think of it and however they might intend to use it for the purpose of carrying out the bad trusts, could not in law be adverse to the *cestui-que-trust*, that is to say, the grantor. Widely different is the case of trustees who obtain the legal estate from the author of the trusts to apply the beneficial uses to specified objects which may or may not be good. For then from the beginning there is always a relation between the author of the trusts and the trustees in whom his confidence has been reposed and there is always the legal possibility at least of another relation coming into existence between them where owing to the failure of the declared trusts, there is a resultant trust back to the grantor who from that moment becomes in law the *cestui que-trust* of the trustees.

Where it was the intention that there should be an ultimate trust in favour of the grantor it is usual to express that on the face of the deed. A deed so framed

A vested remainder in the strictest sense of the English words and *a fortiori* a contingent remainder could not possibly by any stretch of ingenuity be made the subject of a vaild Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession in *præsenti* of that which may never come into possession at all. It is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee and if the donee does not take physical possession of it at the time of making the gift, then till he does, the gift is revocable.

There is no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely

It is undoubtedly a rule of the Mahomedan Law that where a donor makes a gift and accepts in exchange something, whether that something be independent of or part of the original gift then the rest of the gift is irrevocable No gift *in futuro* can be made by a Mahomedan *inter vivos*, in order to validate such a gift there must be an actual delivery or seisin to the donee, there must be a transfer of possession and that transfer of possession must be from the donor to the donee.

While the Mahomedan Law insists that a gift to private person should be free of all pious and religious purposes, this does not necessarily prohibit the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons.

It appears to be the Mahomedan Law that a donor may give his property in *wakf*, that is to say, appropriate and dedicate the corpus to the service of God, while reserving for himself a life-interest in the usufruct. But as in the case of gifts to private individuals the Mahomedan Law never contemplated and will not allow a merely contingent gift in *wakf*. This necessarily flows from the jural conception of a *wakf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life-interest in that property does not in any way clash with that conception for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events There can, in such circumstances, be no appropriation synchronizing with the declaration because should the future events happen it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God.

It would be passing the limits of the application of the maxim "*Usus et conventio vincunt legem*" if it were sought to be shown that the Khojas are allowed by local usage to override the Mahomedan Law which prohibits any Moslem from disposing of more than one-third of his property by will

CASSAMALLY JAIRAJBHAI *v.* SIR CURRIMBHOY IBRAHIM ... (1911) 36 Bom. 214

HOTI VILLAGE—*Survey and settlement—Introduction of "sanctioned" settlement—"Fixed or guaranteed"—Expiration of the period of "sanctioned" settlement—Continuance of the terms of the "sanctioned" settlement after the expiration of the perid as still being sanctioned—Survey and Settlement Act (Bom. Act I of 1865), secs. 25, 28, 37, 38—Land Revenue Code (Bom. Act V of 1879), secs. 102, 106.*

See SURVEY AND SETTLEMENT ACT 290

LAND—*Compulsory acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of statutes.*

See DISTRICT MUNICIPAL ACT 47

LAND ACQUISITION—*Forfeiture by Government of Deshgat Inam lands.*

See FORFEITURE 530

or not the deed of 1886 was a valid deed and prayed that the defective execution of the second deed might be aided by the Court and the provisions of the said second deed declared to be valid.

Held, (1) That the plaintiff was not time-barred as against the trustees from bringing the action.

(2) That however restricted the gift was in form to J. P. it was in effect a gift absolute to him for life, and that entirely irrespective of the power of revocation.

(3) That all the gifts in the trust settlement made contingent upon N. M. dying without issue were bad.

(4) That that portion of the instrument which purported to create a *wakf* in respect of four-tenths of the settled property was bad and void.

(5) That the gift was bad for want of contemporaneous delivery of possession.

(6) That this was a case, if ever there was a case, in which the Courts might act upon those principles which have always guided the Court of Equity in [illegible]

Per Curiam:—It is only in the event of the trusts or some of them being bad that the question of limitation can arise. For if a trust-deed in its entirety is good, then of course effect must be given to it irrespective of any question of lapse of time.

Where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by trespass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trusts declared are in themselves wholly or partially bad, then there is a resultant trust to the author of the trust and the possession of the trustees, whatever they might think of it and however they might intend to use it for the purpose of carrying out the bad trusts, could not in law be adverse to the *cestui-que-trust*, that is to say, the grantor. Widely different is the case of trustees who obtain [illegible]

Where it was the intention that there should be an ultimate trust in favour of the grantor it is usual to express that on the face of the deed. A deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express and resultant trust.

The current of authority seems to have set steadily against the extension of section 10 of the Limitation Act to all cases of resultant implied or constructive trusts.

Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by [illegible]

language be said to be express on the face of the deed, but when the extinction or failure of all the intended trusts is a condition precedent to the resultant trusts coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed.

The answer to the question: What is the true position when declared trusts failed and there is a resultant trust over to the settlor or his heirs? *is to be found in the very elementary proposition that the possession of the trustee is always that of cestui-que-trust*, and, therefore, however, he may think or wish to be holding *as trustee for trusts which have failed in the eye of the law*, he is really holding, when those trusts failed, as trustee for the settlor. Then the position is simply this: so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder for two claimants, the intended beneficiaries of the declared trusts which have failed, and the resultant trustee, that is, the settlor. And no length of possession by a trustee can be adverse to his *cestui-que-trust* as soon as that legal person is discovered and ascertained.

So long as a trustee occupies the position of a trustee as soon as declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession *is essentially that of his cestui-que-trust and can only be changed into* adverse possession by a conscious and deliberate act; that is to say, that he must repudiate all intention of holding for the resultant *cestui-que-trust* and he must assert his intention of *continuing* to apply the trust fund to uses which the Court has declared or which are known to him to have failed. Then his possession might become adverse to his legal *cestui-que-trust* and if that person did not take steps within twelve years he might not be able to avail himself, under the Indian authorities, of the provisions of section 10 of the Limitation Act.

Estoppel and *res judicata* are entirely distinct. *Res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.

It is consistent with the Mahomedan Law that a Mahomedan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of property. *Jainabai v. R. D. Sethna* (1910) 34 Bom. 604, considered.

The power of revocation is inherent in the doner of every gift, so that expressing it, as is usually done by English draftsmen in these voluntary settlements, is merely surplusage and so far from invalidating the gift as a whole would necessarily be implied in it were it not expressed.

Under the Mahomedan Law where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void.

A gift to the donor himself for his life and then over to others could not be reconciled with any recognised principle of the *Mahomedan Law of gift* and must necessarily therefore, so far as the remoter donees are concerned, be bad *ab initio*.

Jainabai v. R. D. Sethna (1910) 34 *Bom.* 604, followed.

A vested remainder in the strictest sense of the English words and *a fortiori* a contingent remainder could not possibly by any *stretch of ingenuity be made* the subject of a valid Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession in *præsenti* of that which may never come into possession at all. It is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the *donee* and if the donee does not take physical possession of it at the time of making the gift, then till he does, the gift is revocable.

There is no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely.

It is undoubtedly a rule of the Mahomedan Law that where a donor makes a [illegible] possession and that transfer of possession must be from the donor to the donee.

[illegible] time to private persons.

It appears to be the Mahomdan Law that a donor may give his property in [illegible] to the service of God, [illegible] But as in the case of [illegible] ntemplated and will not [illegible] flows from the jural [illegible]

It would be passing the limits of the application of the maxim "*Usus et* [illegible]

CASSAMALLY JAIRAJBHAI *v.* SIR CURRIMBHOY EBRAHIM ... (1911) 36 Bom. 214

MAHOMEDAN LAW—*Limitation Act* (*XV of 1877*), *Art.* 123—*Suit to recover* [illegible] *or—Probate and Administration Act* [illegible] *—Bequest for Gadu-ul-khum feast—* [illegible] Article 123 of the second Schedule of [illegible] it where the substantial claim is to recover a legacy, even though not assented to by the executor, and whether or no the suit involves the administration of the whole estate.

[illegible] were to celebrate the appointment of Ali as successor of the Prophet.

Held, that the first two bequests were valid, but the validity of the third bequest was doubtful.

Kaleloola Sahib v. *Nuseerudeen Sahib* (1894) 18 Mad. 201. *Zooleka Bibi* v. *Zynul Abedin* (1904) 6 Bom. L. R. 1058 and *Baba Jan* v. *Kalb Hussain* (1908) 31 All. 136, followed.

Pag

Practice.

See FRAUD 18

——*Redeemed mortgagee retaining mortgaged share as trustee for mortgagor—Notice of assignment by mortgagor—Death of mortgagor before registration of transfer to assignee—Validity of trust—Completion of gift—Indian Trusts Act (II of 1882), sec 5.*

See TRUSTS ACT 39

——*Transfer by mortgagee—Rights of the transferee—Redemption—Construction of statute—Legislative exposition—Limitation Acts (XV of 1877 and IX of 1908), Art. 134.*] The plaintiffs sued in the year 1906 to redeem a mortgage effected prior to the year 1854 The representatives-in-title of the mortgagees, claiming to be absolutely entitled, mortgaged the land with possession to A in 1891 and he sold his rights to defendant 5 The suit having been brought more than 12 years after the alienation to A, defendant 5 claimed as against the plaintiffs the interest of a mortgagee by virtue of his adverse possession under Article 134 of the Limitation Act (XV of 1877).

Held, that it was obligatory on the plaintiffs to redeem defendant 5 before they could recover possession of the property.

Yesu Ramji Kalnath v. *Balkrishna Lakshman* (1891) 15 Bom 583, *Moluji* v. *Fakirchand* (1896) 22 Bom. 225 and *Ramchandra* v. *Sheikh Mohidin* (1899) 23 Bom. 614, followed.

Abhiram Goswami v *Shyama Charan Nandi* (1909) L. R. 36 I. A. 148 and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (1911) 38 Cal. 526, explained.

Swift v. *Jewsbury* (1874) L R 9 Q B. 312 and *Morgan* v. *London General Omnibus Company* (1883) 12 Q. B. D. 201, referred to.

BAGAS UMARJI v. NATHABHAI UTAMRAM ... (1911) 36 Bom. 146

... *o prescribe a fresh line on either side of ... previously prescribed by him—Power to ... to widening the street—The City of ... of 1888 as amended by Act V of 1905), sec. 297 (1) (a)*

See BOMBAY MUNICIPAL ACT 405

... *Municipality to reconstruct a house, building ... rebuild the house—Permission to build balconies ... balconies—Indefinite delay inconsistent with the District Municipal ... Act III of 1901)—District Municipal Act (Bom. Act III of 1901), sec. 96, sub-secs. (2), (3) (a), (4) (a) (ii) and 5.*

See DISTRICT MUNICIPAL ACT 61

——*High Court—Bombay District Municipal Act (Bom. Act III ... compulsory acquisition of land—Compensa- ... —Construction of statutes.*] No ... under clause (3) of section 160 ... III of 1901).

Page

Section 34 of the Indian Penal Code provides not only for liability to punishment but also for subjection of a conspirator to the jurisdiction of a Court though he conspires at a place beyond the jurisdiction.

EMPEROR *v.* CHHOTALAL BABAR ... ... (1912) 36 Bom. 524

PENALTY—*Loan—Default in payment—Enhanced interest—Interest calculated in anticipation added to principal—Relief against penalty—Contract Act (IX of 1872), sec. 74.*

See CONTRACT ACT 164

PENDING PROCEEDINGS—*Suit—Appeal—Enactment relating to procedure—Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 10A.*

See DEKKHAN AGRICULTURISTS' RELIEF ACT 305

PILGRIMAGE—*Legal necessity—Widow—Alienation.*

See HINDU LAW 88

PLEADER—*Bombay Regulation II of 1827, sec. 56—Pleader in the mofussil—Duty towards client—Winding up proceedings—Pleader must not represent parties whose interests are conflicting.*] By the custom of the mofussil a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding.

The pleader in the mofussil is not merely an advocate—he is the confidential [illegible]

he is engaged.

In winding up proceedings, a single pleader must not represent two different creditors whose interests are known to conflict.

A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings.

A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with under the disciplinary jurisdiction for making them. It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected.

Held, overruling the contention, that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him.

GOVERNMENT PLEADER *v.* BHAGUBHAI DAYABHAI ... (1912) 36 Bom. 606

PLEDGE—*Ornaments—Unauthorised pledge—Suit against pledgor—Subsequent pledge—Recovery of judgment against pledgor—Non-satisfaction—Suit against pledgee for detention after demand.*

See RES JUDICATA 189

POC[illegible] CANTONMENT—*Cantonment Code of 1836 and 1850—Ownership of land* [illegible]

See CANTONMENT TENURE 1

In execution under a money-decree certain property mortgaged to the plaintiff on the 8th September 189[illegible] was attached and was about to be brought to sale. The

THE

INDIAN LAW REPORTS,

Bombay Series.

PRIVY COUNCIL.*

KAIKHUSRU ADERJI GHASWALA AND OTHERS (DEFENDANTS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF).

1911. *May* 18, 19, 23. *June* 27.

[On appeal from the High Court of Judicature at Bombay.]

Cantonment Tenure—Cantonment Code of 1836 and 1850—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment, claim to—Presumption of ownership—Possession, effect of—Right of Government to resume land.

In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment, the Government as plaintiffs claimed that the land belonged to them, and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon. The defendants claimed the land as their private property on the ground that their predecessors in title were owners of the land at the time the Cantonment was established, and that nothing had happened since to vest the title in the Government, and while admitting that they were subject to military jurisdiction, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees. They also contended that being in actual possession of the land the onus was on the plaintiffs to rebut the presumption of ownership in fee attaching to the possession of land whether in a Cantonment or elsewhere. The title of the defendants was based on a document dated 27th August 186[illegible] by which one Pyte, a Purser in the Indian Navy, certified that for the consid-

---

* *Present*:—Lord Macnaghten, Lord Atkinson, Lord Robson and Mr. Ameer Ali.

THE

INDIAN LAW REPORTS,

Bombay Series.

PRIVY COUNCIL.*

KAIKHUSRU ADERJI GHASWALA AND OTHERS (DEFENDANTS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF). 1911. *May* 18, 19, 23. *June* 27.

[On appeal from the High Court of Judicature at Bombay.]

Cantonment Tenure—Cantonment Code of 1836 and 1850—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment, claim to—Presumption of ownership—Possession, effect of—Right of Government to resume land.

In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment, the Government as plaintiffs claimed that the land belonged to them, and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon. The defendants claimed the land as their private property on the ground that their predecessors in title were owners of the land at the time the Cantonment was established, and that nothing had happened since to vest the title in the Government, and while admitting that they were subject to military jurisdiction, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees. They also contended that being in actual possession of the land the onus was on the plaintiffs to rebut the presumption of ownership in fee attaching to the possession of land whether in a Cantonment or elsewhere. The title of the defendants was based on a document dated 27th August 1804 by which one Pyott, a Purser in the Indian Navy, certified that for the consid-

---

* *Present:*—LORD MACNAGHTEN, LORD ATKINSON, LORD ROBSON AND MR. AMEER ALI.

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

deration therein mentioned he "handed over to Dorabjee Pestonjee all claim he had to the house, out-houses and premises generally, marked 23 Staff Lines, Poona Cantonment". This document was endorsed as "sanctioned" by the Brigadier-General Commanding.

Held, on a consideration of the mode of delimitation of the Poona Cantonment, the regulations affecting it, the arrangements made with the owners of the lands taken to indemnify them for the loss they sustained by being deprived of their rights of occupancy, and the other circumstances of the case, (1) that even if the defendants established that their house was built at, or before, the time the Cantonment was made, there was still a strong probability that they were duly compensated for the change in their position as owners to that of licensees; (2) that from the Regulations as summarised in Aitchison's Cantonment Code of 1836, and Jameson's Cantonment Code of 1850, it was clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities, and the permission of the Commanding Officer was necessary even for the letting or sale of the house so built.

It was *therefore* impossible to say that mere possession or occupation of the bungalow on this site afforded any presumption whatever that the defendants or their predecessors in title were owners in fee. The presumption was all the other way, and was strengthened by an examination of the history of the site itself which showed that the defendants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the Cantonment. The defendants were, therefore, mere licensees and the land had been lawfully resumed by Government.

APPEAL from an interlocutory order (12th February 1908) of the High Court at Bombay, which directed the re-hearing of an appeal from a judgment and decree (22nd October 1904) of the Court of the District Judge of Poona which had dismissed the respondents' suit.

The suit was one for ejectment of the appellants, and the plaint, filed on 6th August 1903, after (in paragraph 1) describing the land claimed as "a Government plot of ground now known as No. 9 Arsenal Road (formerly as No 23A, Staff Lines) situate within the limits of the Poona Cantonment" and stating the boundaries, continued (in paragraph 2): "this plot was formerly occupied as a site for a bungalow by one Mr. I. V. C. Beyts, a Purser in the Indian Navy, on Military or Cantonment tenure under which the holder has no right of ownership over the ground, but merely a right of occupancy,

and the land is resumable at the pleasure of Government, compensation being given for any buildings standing on it at the time of resumption. The house and out-houses standing on the said plot and all his interest in the said plot of ground were sold by the said Beyts to one Dorabji Pestanji Ghaswala on 27th August 1864, and the transfer of the occupancy of the said plot was sanctioned by the Brigadier-General for the time being commanding the Poona Brigade in accordance with Cantonment Regulations."

In paragraph 3 it was stated "that the said Dorabji Pestanji died, leaving his widow Sonabai, two sons named Aderji and Framji (defendant No. 2), and two daughters Jivanbai, the wife of one Jamsetji Maneckji Ghaswala, and Bachubai, the wife of Sorabji Nanabhoy Harda, as his heirs. Sonabai died about 10 years ago. Aderji died about a year ago, leaving his son Kaikhusru Aderji (defendant No. 1) as his heir and executor of his will. The third defendant is the second wife of Mr. Sorabji Edulji Ghaswala, who is dead, and whose first wife was a daughter of Dorabji Pestanji Ghaswala. Consequently she is added as a defendant." Paragraph 6 stated that "since the year 1899 the said plot has remained entirely vacant with the exception of a compound wall, an iron latrine and a small out-house and fountain in the compound, the market value of all which is about Rs. 500."

On 23rd March 1903 the Solicitor to Government under the direction of the Government of Bombay gave on behalf of Government and the Poona Cantonment Committee a notice to the first, second and third defendants and to Jivanbai and Bachubai, the daughters of Dorabji Pestanji, deceased, to quit and deliver up on 1st May 1903 to the Cantonment Magistrate, Poona, possession of the said property known as No. 9 Arsenal Road, and gave further notice that Government were prepared to pay the sum of Rs. 500 as the value of the erections then standing on the said ground, or such amount as might be determined by a Committee of arbitration constituted as provided in chapter 20 of the Cantonment Code of 1899. In reply to the notice to quit, the first, second and third defendants wrote

to the Solicitor to Government a letter dated 20th April 1903 in which they stated that they disputed the rights of Government or anyone on their behalf to resume the said piece of land. Bachubai and Jivanbai also wrote letters dated 25th and 27th April 1903 in reply to the notice to quit that they had no interest of any sort in the said land.

The plaint further stated that the Cantonment Magistrate after giving notice of an appointment for that purpose duly attended at the property on 1st May 1903 to receive possession of the land, but the first defendant, who was present, refused to deliver possession, that the market value of the property was Rs. 18,000; and that the cause of action arose on the 1st May 1903. And the plaintiff prayed for possession, and for such further and other relief as the nature of the case might require.

The defendants in their written statements denied that the plot of land in suit belonged to the Government, that it was held on military or cantonment tenure and that they were liable to ejectment. They also alleged that the house standing on the plot of land was in ruins and no new house had been built owing to the prohibitive action of the Cantonment authorities. The third defendant further pleaded that the defendants and their predecessors in title had been in adverse possession, for more than 60 years, and that the suit was therefore barred by limitation

On the issues framed on the pleadings the District Judge (Mr. Lucas) held on issue No 2 that the land in question was not occupied on Military or Cantonment tenure by the defendants' predecessors in title; that the plaintiff had failed, therefore, to establish his title; that there was nothing on the record to show that the defendants or their predecessors in title had ever admitted that the land in suit was not their private property. He further held that the suit was barred by limitation; and made a decree dismissing the suit.

On appeal by the plaintiff, the High Court (RUSSELL and BATTY, JJ.) were of opinion that sufficient attention had not been given by the District Court to exhibit 71, one of the documents relied on by the plaintiff, and consequently its proper

effect as evidence had been lost sight of. The document (exhibit 71) was as follows :—

"I hereby certify that in consideration of having received the sum of Rupees (6,150) six thousand one hundred and fifty, I hand over to Dorabjee Pestanjee Esquire all claim I have to the house, out-houses and premises generally marked *No. 23 Staff Lines, Poona Cantonment.*

"Signed, sealed, and delivered at Poona this twenty-seventh day of August in the year of Our Lord one thousand, eight hundred and sixty-four.

(Sd.) I. V. C. BEYTS,
Purser of Her Majesty's late Indian Navy.

"Witnesses.

"(Sd.) W. WELLIS.
"(Sd.) H. V. FAULCONER.

"Sanctioned.

"Poona, 27th August 1864.

"(Sd.) F. C HEATH,
Brigadier-General Commanding Poona Brigade."

The High Court, therefore, on 13th June 1906 remanded the case to the District Court for findings on the following issues :—

"1. What is the legal effect of exhibit 71?

"2. Does the use of the word 'sanctioned' therein imply that the occupation of the defendants and their predecessors in title was a permissive occupation, or how otherwise?

"3. Are the defendants in a position to rebut the *primâ facie* presumption arising on the face of the said exhibit?

"4. In what sense was the word 'sanction' used in exhibit 71 and understood generally according to the practice of the locality at the time of its execution?"

Either party was to be at liberty to adduce further evidence on the additional issues as they might be advised. Both parties having produced additional evidence, the District Court (of which the Judge was then Mr. Kincaid) found on the four issues as follows :—

"(1) Exhibit 71 evidences the sale of the house 23 Staff Lines (now No. 9 Arsenal Road) to Mr. Dorabji with the sanction of

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

the military authorities and conferred permission on Mr. Dorabji to occupy the land in suit subject to Cantonment regulations.

"(2) The use of the word 'sanctioned' therein implies that the occupation of the defendants and their predecessors in title was a permissive occupation.

"(3) In the negative.

"(4) The word 'sanction' as used in exhibit 71 and as understood generally in 1864 meant the permission accorded by the military authorities to the sale of the bungalow and the out-houses on the land in dispute"

When the case came before the High Court after the remand it was heard by the same Judges as before and there was a difference of opinion between them.

RUSSELL, J. (then officiating Chief Justice) being of opinion that the plaintiff had proved the limited character of the defendants' occupation, whilst BATTY, J., came to the conclusion that the plaintiff had failed to establish a title to the land.

The following are the material portions of the judgments which were delivered on 29th July 1907.—

RUSSELL, J. (officiating C. J.):

"As regards the fourth issue, which runs as follows:—'In what sense was the word 'sanctioned' used *in exhibit 71 and understood generally according to the* practice of the locality at the time of its execution?' we have been assured by the Advocate General that it was found impossible for the plaintiff to obtain any evidence although every endeavour was made to do so, and such a possibility was certainly never contemplated either by my learned colleague or by myself. In his remand judgment, it will be observed, he says *inter alia* 'that the plaintiff should have been required to give formal evidence of practice, in the course of which he contends the word 'sanction' was used with the significance now attributed to it,' with which remark I concurred. I do not think that our remand judgment can be read in such a way as to have held that if such formal evidence were not given the plaintiff must necessarily fail. The use of the word 'formal' in the above passage from my learned colleague's judgment seems to me to bear out this view. This being so, it remains for us to say whether or not the view of Mr. Kincaid on the first issue: What is the legal effect *of exhibit 71?* is correct.

"It is not necessary to set out the terms of that exhibit over again as in my opinion it amounts to a surrender by Mr. Beyts of all his interest in No. 23 Staff Lines, Poona Cantonment, and an admittance of Dorabji Pestonji thereto.

"In the present case, the plaintiff puts in exhibit 71, wherein, it appears, that Dorabji Pestonji was admitted to the rights of Mr. Beyts in 23 Staff Lines in the Poona Cantonment. Now the use, therefore, of the words 'Poona Cantonment' in my opinion was notice to all persons being admitted to premises therein that 'Cantonment' had a peculiar meaning and implied a peculiar tenure. What that peculiar tenure was appears from the various exhibits which I now enumerate, Nos. 221, 222, 224, 249, 250, 254, 260, 264, 265, 266, 271, 274, 275, 276, 307, 364, 365[1]. In addition to the exhibits put in before Mr. Lucas, on the remand herein the plaintiff also put in exhibit 382[2].

"Now, although it may be that the abovementioned Orders and Regulations may not have the force of law, still I am of opinion that all persons purporting to deal with the lands within the Cantonment must be taken to have had notice of those Orders and Regulations which, seeing the long period of years during which they had been promulgated, must have been known to every person desiring to acquire any rights to immoveable property within the Cantonment.

"In exhibit 51 (1828) and exhibit 53 (1830) the property in question is included in Cantonment limits."[3]

After referring to *Framji Dorabji Ghaswala* v. *Secretary of State for India*[4], and *Poona Cantonment Committee* v. *Dhondiram*[5], the judgment continued :—

"It is well settled that a purchaser is bound to inquire into the title to the land offered to him by his vendor, and will be affected with notice of all that he could have ascertained if he had made proper inquiries, whether his abstention from inquiry is due to voluntary waiver or waiver under contract (*Wilson* v. *Hart*[6], *Patman* v. *Harland*[7] cited in *In re Nisbet and Potts' Contract*[8]).

"As to adverse possession it, in my opinion, cannot apply in their case, because the possession of Beyts and his predecessors cannot be said ever to have been adverse to Government. As regards the land they are mere licensees.

"As pointed out by Mr. Kincaid, the Registers of 1850 (exhibit 176 of 1861, exhibit 177 of 1863 and exhibit 178) show that the various owners of the bungalows

(1) All these exhibits show that grants of land in Military Cantonments were totally contrary to the established practice therein ; and that the permission given to erect houses on ground within such a Cantonment conferred no right of property whatever in the ground allotted for such erections.

(2) Regulations relating to Cantonments and Quarters, General Order, dated 31st July 1856.

(3) Exhibits 51 and 53 were plans of the Poona Cantonment made in the years respectively mentioned or thereabouts.

(4) ([illegible]) P. J. p. 207.

(5) ([illegible]) P. J. p. 170.

(6) (1866) L. R. 1 Ch. 463 (467).

(7) (1881) 17 Ch. D. 353 (359).

(8) [1905] 1 Ch. 391 (400) ; affirmed [1906] 1 Ch. 386.

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

therein mentioned had registered their names and given the value and rental as prescribed by Rules 145 and 146 in exhibit 275, the rules of the 15th December 1851.

"Now, it seems to me that the owner of a house within the Cantonment on becoming such owner must be taken to have had notice of the Register and its terms, and, this being so, had he referred to the Register what would he have found? He would have found that the Register was headed: 'Register of all private buildings and ground enclosed on private account in the Cantonment of Poona.' Now, that refers in my opinion to two separate things: private buildings and ground enclosed on private account 'Private buildings' means buildings owned by private persons. 'Ground enclosed on private account' means ground which Government had allowed not to be bought or transferred but merely to be enclosed on private account. Then, again, persons seeking to acquire rights over immoveable property in the Cantonment w... d have found that the house in dispute, which is No. 23 in the Registers 176, 177, 178 and No. 7 in exhibit 179 and 23 in exhibit 180 (where 'Sorabji' is evidently a mistake for 'Dorabji') had formed part of the original Cantonment. By 'Original Cantonment' is evidently meant that the limits of which were fixed on the 31st of March 1827. It will be remembered that those limits were fixed after the passing of Regulation XXII of 1827 which was passed on the 1st of January of that year.

"From the first argument of Mr. Raikes, it appears that prior to 1827 a Regulation had been passed in 1826 to a similar effect Section 21 of the Regulation of 1827 shows clearly that no private property was to be included within the limits of the Cantonment and [exhibit 192, the Collector's letter of the 3rd of September 1826 to the Secretary to the Governor, shows the very great care which the then Collector was taking that no private property should be included within the Cantonment limits The property in dispute in this case was within those limits.

"Great stress was laid upon the fact that it appears there was a bungalow upon the site in dispute prior to 1826, but I fail to see how that can be said to make any difference. It is difficult to suppose that, if the site in question and the bungalow upon it had been the private property of any individual, the authorities who were then marking out the limits of the Cantonment would have included it in the Cantonment limits.

"No doubt Mr. Raikes has been obliged to concede that he is not in a position to prove, although he did his best to do so by minute and elaborate analysis of the jamabandi chitis and documents produced by, and the evidence given by, Mr. Joglekar. Though it is not possible to prove to demonstration that every square yard of land within the Cantonment was actually and formally taken up by Government either by granting other land in substitution therefor or by waiving the assessment thereon (which was the principle upon which the Government was then acting), still in my opinion a jury would be justified in finding that the land in question had been duly and properly taken up by Government together with the other lands within the Cantonment limits, and it is not as if private owners of land, if any such there were, or houses within those limits had no one to protect their

interests because the letter from the then Collector that I have referred to above shows that that officer was fully alive to those interests and was not likely to allow them to be jeopardized as he would have to incur the responsibility therefor. And it is difficult to suppose that his predecessors would not have exercised the same care. If I am right in the construction that I have put upon exhibit 71, it appears to me that the onus was shifted from the plaintiff to the defendants and that they were bound to prove that the house and site in question had been the private property of their predecessors and had not been taken up by Government.

"There are, however, certain other circumstances which seem to me to show that the defendants were fully aware of the Cantonment Regulations and knew that they must comply with the terms thereof. The first of these is the correspondence during 1887 to 1890 relating to the re-thatching of the bungalow on the site in question. I refer to exhibits 99, 100, 101, 102, 103, 104 and 105. Again, in exhibit 106 in 1882, we have the application signed by Adarji Dorabji for the building of a fowl-shed. It appears to me that this application is entirely inconsistent with the idea that the defendants were the absolute owners of the land in question. Further, the correspondence exhibits 115, 116, 117, 118 shows that it was the bungalow, No. 9, Arsenal Road, which was mortgaged to Mr. Nathu and not the land. And the other exhibits regarding the removal of ruined out-houses are wholly inconsistent with the property being the absolute property of the defendants. Now, if the land in question was actually the property of the defendants and believed by them to be so, I cannot understand how they could have brought themselves to requesting sanction to put up the fowl-house from the Cantonment authorities, or how their mortgagee when he was told to put the property in repair did not at once say that 'it is the absolute property of my mortgagor and the Cantonment people have nothing to do with it.' Another point, although it is a minor one, appears in the following exhibits:—

"In No. 176 the sale-price is entered as Rs. 2,500, in 177 it is entered as Rs. 3,500 and in 178, 179 and 180 it is entered as Rs. 6,000; and in exhibit 71 Dorabji Pestonji paid apparently Rs. 6,150. Now, it is to my mind very difficult to believe that these prices were intended to cover the value of the land, for we find in the evidence before Mr. Lucas that at the present time the land alone is valued at Rs 18,000, and no evidence has been given to show what would have been the value of this land in the year 1861.

"The next point to consider is: What is the meaning of the word 'sanctioned' in exhibit 71? and I apprehend that this Court must now put its own construction upon that word. The only meaning that I have been able to attribute to that word upon exhibit 71 is that in accordance with the Rules and Regulations then prevailing upon the subject the Brigadier General permitted and ratified the surrender by Beyts and the admittance of Dorabji Pestonji. I cannot believe that it was intended to refer merely to the transfer of one name in place of another in the Register, for otherwise the Register would be a purely useless and unnecessary document. By the use of the word 'sanctioned' I take it what the Brigadier-General meant was that inasmuch as Mr. Beyts had surrendered all his rights to this Cantonment property the Brigadier-General was willing to substitute Dorabji

Pestonji for him under the then prevailing orders and regulations, under which, as we know, it was entirely *ultra vires* for the Brigadier-General to allow or to connive at allowing the vendee of those rights to acquire any proprietary rights whatever in the land itself No doubt, when we look at the precis of the various exhibits mentioned at page 426, we do find that in several instances sales or mortgages of bungalows with their out-houses, lands, gardens, etc., are sanctioned; and very great stress upon this fact was laid by the defendants' counsel and pleaders; and this fact has undoubtedly weighed considerably upon my learned colleague in the judgment which he is about to deliver But in the first place the parcels in exhibit 71 are not described in the same terms as in those deeds, and if once it is established that the Commanding officers had no authority whatever to allow any proprietary rights in the lands themselves to be acquired by the transferees, the word 'sanctioned' or 'granted' in those deeds must in my opinion be held to have reference only to so much of the property comprised therein as the Commanding Officers had power to sanction or ratify. If I am right in this reading of the word 'sanctioned,' the fact that the plaintiff has found it impossible to adduce any evidence as to the practice with regard to which the word is used becomes of no importance.

"With regard to the 3rd issue remanded to Mr. Kincaid, I am of opinion that the defendants have wholly failed to rebut the *primâ facie* presumption arising on the face of exhibit 71.

"I need hardly say that I have had considerable hesitation in arriving at the above result and differing from the opinion of my learned colleague whose experience of cases of this sort is very much greater than mine; but I have formed a very strong opinion that the defendants' predecessor never acquired or paid for, or intended to acquire or pay for, or thought that he was acquiring or paying for any property in the land itself; and the rights that he acquired were rights only in and to buildings upon the site in question in 1864."

"BATTY, J.—So far as the evidence in this case at present goes it fails, in my opinion, to establish the acquisition by Government of the land in question.

"The voluminous and elaborate evidence and arguments adduced to show that Government acquired large quantities of land within the limits of the Poona Cantonment fall short of proving the plaintiff's title in this, that admittedly the accuracy of the measurements as calculated can only be regarded as approximate. This evidence appearing inconclusive, it became necessary to consider the bearing on this case of exhibit 71, the document transferring to the defendants' father the interests of his vendor in the site in question For the plaintiff it was contended that as transfers by grantees on Cantonment conditions require for their validity the permission of the Military authorities, therefore exhibit 71, bearing an endorsement of sanction by such authority, was in effect an admission by vendor and vendee that the transfer thereby evidenced required such sanction, and was the transfer of a title originating in a grant under Cantonment rules. What the plaintiff had to prove was not only that transfers of Cantonment grants were sanctioned, but that no transfers except those of Cantonment grants were ever sanctioned, or, in other words, that all sanctioned transfers were transfers of Canton-

ment grants. It was understood that the plaintiff was prepared to prove that sanction was in general acceptation understood as applicable only to Cantonment grants, and that it was therefore a matter of common knowledge that application for sanction involved an admission that the land transferred was held on Cantonment grant. The remand to the lower Court was allowed because the plaintiff's assertion that this was universally understood had been considered, and would, if established by evidence, or undisputed, prove an important element in the case. But in requiring that formal evidence should be adduced in the case it was meant that the assertion must be proved in regular form by evidence as distinguished from mere assertion in the plaint or arguments; and it was not intended to suggest that evidence was required merely as a matter of form and could be dispensed with if the construction contended for were shown to be a possible construction.

"The plaintiff, however, has adduced no evidence whatever on remand to show that the word 'sanctioned' was in general acceptation understood to amount to an admission that Cantonment conditions applied. The only evidence put in for the plaintiff is exhibit 382 containing regulations requiring the permission of the Military authorities to the transfer of Cantonment grants. The existence of such a rule only shows that applications for sanction might have been made and granted in compliance therewith. But it does not prove that every party to a transfer knew that an application of sanction could only be made for the purposes of that rule, and in reference to land held on Cantonment tenure. It is quite consistent with the existence of that rule that private dealing with land within Cantonment limits might have followed the practice known to be common on transfer of land *within those limits, without any intention of admitting.*

"Application of sanction could only be made for the purposes of that rule and in reference to land held on Cantonment tenure. If the practice of obtaining sanction to transfer in Cantonment limits was known to be the common practice, it is quite conceivable that such practice might be followed either in ignorance of its origin or *ex major cautela* by persons who had no intention of admitting thereby the title of Government to the land transferred. And what plaintiff had to prove was that everybody who followed that practice knew that he was thereby making such admission. The plaintiff has made no attempt to prove this. The defendant on the other hand *refers* the Court to the instances on the record in which sanction was sought and obtained for documents which purport on the face of them to transfer an absolute proprietary right in the land. It is impossible to hold that the general public, in accepting the endorsement of the word 'sanctioned' on documents, recognised that endorsement as a disclaimer of the proprietary rights asserted in those documents.

"It is quite possible that the assertion of proprietary title in such documents may have been groundless. But that is not the point. The assertion of those rights by the parties seems to me conclusive that they at least would not have regarded the acceptance of the word 'sanctioned' as an unequivocal admission that no such rights existed. It may be that sanction was obtained without any enquiry as to the purpose for which it was granted. But a failure to enquire

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

Pestonji for him under the then prevailing orders and regulations, under which, as we know, it was entirely *ultra vires* for the Brigadier-General to allow or to connive at allowing the vendee of those rights to acquire any proprietary rights whatever in the land itself. No doubt, when we look at the precis of the various exhibits mentioned at page 426, we do find that in several instances sales or mortgages of bungalows with their out-houses, lands, gardens, etc., are sanctioned; and very great stress upon this fact was laid by the defendants' counsel and pleaders; and this fact has undoubtedly weighed considerably upon my learned colleague in the judgment which he is about to deliver But in the first place the parcels in exhibit 71 are not described in the same terms as in those deeds, and if once it is established that the Commanding officers had no authority whatever to allow any proprietary rights in the lands themselves to be acquired by the transferees, the word 'sanctioned' or 'granted' in those deeds must in my opinion be held to have reference only to so much of the property comprised therein as the Commanding Officers had power to sanction or ratify. If I am right in this reading of the word 'sanctioned,' the fact that the plaintiff has found it impossible to adduce any evidence as to the practice with regard to which the word is used becomes of no importance.

"With regard to the 3rd issue remanded to Mr Kincaid, I am of opinion that the defendants have wholly failed to rebut the *primâ facie* presumption arising on the face of exhibit 71.

"I need hardly say that I have had considerable hesitation in arriving at the above result and differing from the opinion of my learned colleague whose experience of cases of this sort is very much greater than mine; but I have formed a very strong opinion that the defendants' predecessor never acquired or paid for, or intended to acquire or pay for, or thought that he was acquiring or paying for any property in the land itself, and the rights that he acquired were rights only in and to buildings upon the site in question in 1864."

"BATTY, J.:—So far as the evidence in this case at present goes it fails, in my opinion, to establish the acquisition by Government of the land in question.

"The voluminous and elaborate evidence and arguments adduced to show that Government acquired large quantities of land within the limits of the Poona Cantonment fall short of proving the plaintiff's title in this, that admittedly the accuracy of the measurements as calculated can only be regarded as approximate. This evidence appearing inconclusive, it became necessary to consider the bearing on this case of exhibit 71, the document transferring to the defendants' father the interests of his vendor in the site in question. For the plaintiff it was contended that as transfers by grantees on Cantonment conditions require for their validity the permission of the Military authorities, therefore exhibit 71, bearing an endorsement of sanction by such authority, was in effect an admission by vendor and vendee that the transfer thereby evidenced required such sanction, and was the transfer of a title originating in a grant under Cantonment rules. What the plaintiff had to prove was not only that transfers of Cantonment grants were sanctioned, but that no transfers except those of Cantonment grants were ever sanctioned, or, in other words, that all sanctioned transfers were transfers of Canton-

ment grants. It was understood that the plaintiff was prepared to prove that sanction was in general acceptation understood as applicable only to Cantonment grants, and that it was therefore a matter of common knowledge that application for sanction involved an admission that the land transferred was held on Cantonment grant. The remand to the lower Court was allowed because the plaintiff's assertion that this was universally understood had been considered, and would, if established by evidence, or undisputed, prove an important element in the case. But in requiring that formal evidence should be adduced in the case it was meant that the assertion must be proved in regular form by evidence as distinguished from mere assertion in the plaint or arguments, and it was not intended to suggest that evidence was required merely as a matter of form and could be dispensed with if the construction contended for were shown to be a possible construction.

"The plaintiff, however, has adduced no evidence whatever on remand to show that the word 'sanctioned' was in general acceptation understood to amount to an admission that Cantonment conditions applied. The only evidence put in for the plaintiff is exhibit 382 containing regulations requiring the permission of the Military authorities to the transfer of Cantonment grants. The existence of such a rule only shows that applications for sanction might have been made and granted in compliance therewith But it does not prove that every party to a transfer knew that an application of sanction could only be made for the purposes of that rule, and in reference to land held on Cantonment tenure It is quite consistent with the existence of that rule that private dealing with land within Cantonment limits might have followed the practice known to be common on transfer of land within those limits, without any intention of admitting.

"Application of sanction could only be made for the purposes of that rule and in reference to land held on Cantonment tenure. If the practice of obtaining sanction to transfer in Cantonment limits was known to be the common practice, it is quite conceivable that such practice might be followed either in ignorance of its origin or *ex major cautela* by persons who had no intention of admitting thereby the title of Government to the land transferred. And what plaintiff had to prove was that everybody who followed that practice knew that he was thereby making such admission. The plaintiff has made no attempt to prove this. The defendant on the other hand refers the Court to the instances on the record in which sanction was sought and obtained for documents which purport on the face of them to transfer an absolute proprietary right in the land. It is impossible to hold that the general public, in accepting the endorsement of the word 'sanctioned' on documents, recognized that endorsement as a disclaimer of the proprietary rights asserted in those documents.

"It is quite possible that the assertion of proprietary title in such documents may have been groundless. But that is not the point. The assertion of those rights by the parties seems to me conclusive that they at least could not have regarded the acceptance of the word 'sanctioned' as an unequivocal admission that no such rights existed. It may be that sanction was obtained without any enquiry as to the purpose for which it was granted. But a failure to enquire

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

carries no consequences of which another party can avail himself without proof of title in himself.

"It appears to me therefore that the defendant's predecessors in interest cannot be held to have admitted the title of Government by obtaining the endorsement of the word 'sanctioned' in exhibit 71, in the absence of evidence to show that such action was universally recognised as tantamount to such an admission.

"Then it has been suggested that as the old Regulations directed that no private property should be included in Cantonments, it should be presumed that the land in question was not private property on the maxim *omnia præsumuntur rite esse acta.* But that maxim applies only to the manner of performance, and the presumption it allows is that acts or duties proved to have been done, were done with due formality It would not justify the inference that the act or duty (in this case that of excluding private property) had been performed

"It has also been urged that as the intention of Government to acquire all land within these limits is proved, a presumption arises that Government actually did so Intentions may be inferred from acts, but there is no rule that acts should be presumed from intentions. I am unable therefore after full consideration to hold that Government have disclosed any ground on which a private litigant could successfully claim ejectment No doubt they have much land within Cantonment limits, but it is not impossible or improbable that private property which pre-existed also survived delimitation, and I do not think reprehensible recklessness in failing to preserve due record of the respective rights and interests of the state and of private owners can be admitted as a ground for requiring from the present plaintiff less cogent evidence than would be demanded from any other plaintiff suing in ejectment If further evidence were available to throw more light in the matter, I should welcome the opportunity of further enquiry into a question which is certainly left in a very unsatisfactory condition. But in the evidence, as far as it goes, I cannot find grounds which in my opinion would be required in an ordinary suit for the ejectment of a person in possession of immoveable property with colour of title extending at least over half a century."

In consequence of this difference of opinion RUSSELL, J. (officiating C. J.), in the absence of BATTY, J., who had left Bombay, ordered the case to be referred to a third Judge. Against that order the defendants, on 14th August 1907, appealed, and on 12th February 1908 CHANDAVARKAR and KNIGHT, JJ., reversed it and directed that the original appeal should be placed before the Court for fresh hearing and disposal. The re-hearing was commenced before CHANDAVARKAR and HEATON, JJ., on 26th February 1908, and on 27th February an application was made by the defendants for leave to appeal to

His Majesty in Council against the order of 12th February 1908, but on 4th March 1908 CHANDAVARKAR and HEATON, JJ., refused the application.

The defendants Nos. 1 to 3 then applied to His Majesty in Council for special leave to appeal against the order of 12th February 1908, and on 4th July 1908 that application was granted upon terms that the order of 12th February 1908 should be "treated as if it had been a final decree on the merits, and the effect of the judgments of 29th July 1907 being treated as neutral, each party being considered as having one judgment in their favour" and liberty "being reserved to the parties on the hearing of this appeal to raise such questions of fact and law as they may be advised."

On this appeal,

DeGruyther, K. C., and *G. Considine O'Gorman* for the appellants contended that the respondent had wholly failed to prove that he had any title to the plot of land in suit, or the right to eject the appellants as he claimed. The onus being on him he had not discharged it. He stated that all the lands within Cantonment limits were the property of Government, that no private property was included when the delimitation of the Cantonment was made. But there were undoubtedly instances (exhibits 151 and 192 amongst others) in which private property was included, and the appellant's case was that his predecessors in title were the owners of the property in dispute before the Cantonment limits were fixed; and if compensation had been paid for it, as the respondent stated was the rule where any private property was included, there would have been some record of it; yet all that was now relied upon was the presumption that compensation was given which, it was submitted, was not sufficient. The principles of the later Land Acquisition Acts, if not the actual legislation, were enforced as long ago as 1820. Reference was made to the Bombay Gazetteer, Volume XVIII, part 2, pages 287, 291, 300, 301, 304, 305, and part 3, pages 353, 357. Bombay Regulation I of 1819 was the first Regulation to fix the limits of Cantonments, but in that legislation there was nothing to suggest

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

any inquiry as to the persons to whom the land taken up belonged, or their rights; it provided only for the jurisdiction the Military authorities should have. In those early days of occupation by the British Government the mode of marking off land for a Cantonment no doubt often interfered with private rights in a way that was not intended, and could not be justified; and it could not be presumed that all things that should have been done were rightly done, when there was no proof that they had been done at all. No steps were ever taken to exclude private property until Bombay Regulation III of 1826, by section 21 of which private property was for the first time excluded, the inference being that previous to that date it had sometimes been included. Section 21 of Bombay Regulation XXII of 1827 was in similar terms. That was a direction to the executive and could not operate to confiscate private property which in neglect of such direction had been included in Cantonment limits; and no presumption that private property had been excluded could arise from the provisions of that Regulation. Legislation subsequent to 1827 suggested the inference that private land had been included in Cantonment limits. Reference was made to Bombay Act III of 1867, section 2, Act XIII of 1889, section 26 (as to Registration of immoveable property in Cantonments); the Cantonments Code, 1899, chapter XXII, section 76, and 89, clause (1), and sections 268, 269 to show that no presumption such as the respondent here desired to be drawn was ever made by the authors of that legislation. It was submitted therefore that it had not been shown that it was an essential ingredient of the Military or Cantonment at the time of the occupation of the land that the holders of the land had no right of ownership in the ground, but merely a right of occupancy; and, therefore, that for the land in dispute, if resumable by Government, compensation should be paid to the appellants on the basis of its being their private property. The appellants moreover were in possession, and the onus was on the respondent of rebutting the presumption of ownership which attached to such possession. Further it was contended generally for the reasons given by Mr. Justice Batty that there had been no

admission by the appellants of the title of the respondent: exhibit 71 did not under the circumstances amount to such an admission. In any case the amount of compensation offered was not sufficient.

Cohen, K. C., *A. M. Dunne* and *E. M. Konstam* for the respondent contended that the land in dispute was within the limits of the Poona Cantonment, and had always been so since the limits were first fixed in 1827; that all land included within the limits so fixed had been ever since the property of Government; that the land in suit was first enclosed and built upon after it had been included as part of the Government land in the Cantonment, and was only so enclosed and built upon with the permission of the Military Authorities, and subject to the condition that the land remained the property of Government; and that the only rights possessed by the appellants were rights of occupancy subject to resumption by Government, compensation being paid by Government for any buildings standing upon the land. Reference was made to Ilbert's Government of India, page 42; Bombay Regulation I of 1819, section 4; Bombay Regulation III of 1826 (repealed by Bombay Regulation I of 1827 which did not come into force until September 1st, 1827); Bombay Regulation XXII of 1827, section 21; Aitchison's Cantonment Code, 1836, article 222; Jameson's Cantonment Code, 1850, rules 12, 129 and 139, 145 and 146, and appendix I, page 20; and Cantonments and Quarters Regulations, 1856, rules 14, 22 and 31. The Court may presume an official act to have been properly done. In the case of many administrative acts the Governor of Bombay in Council for the time being, and the officers subordinate to him carried out various requirements of section 21 of Bombay Regulation III of 1826 and of section 21 of Bombay Regulation XXII of 1827; and it was submitted that the inference to be drawn from these facts was that the substantive provisions of the same sections prohibiting private property from being included in Cantonment limits were also properly carried out. Evidence Act (I of 1872), section 114, clause (e); Taylor on Evidence, 10th Ed., section 147, page 147; Ameer Ali and

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

Woodroffe on Evidence, page 68; *Jones* v. *Williams*[1]; and Arnould on Insurance, 8th Ed., section 725, page 885, were referred to. The appellants had failed to prove any title to the land in suit, or any such possession of the land in suit adverse to the respondent or his predecessors in title, the East India Company, as would give the appellants title by prescription, *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh*[2]. The transfer to the appellants by exhibit 71 was only of the bungalow and other buildings, not of the land. The Registers of the Poona Cantonment, the presence of the word "sanctioned," in exhibit 71 with the signature thereto of the General Officer Commanding the Poona Brigade, and other acts and proceedings with relation to the land in suit, as well as the admissions by the appellants and their predecessors in title showed that they never intended to purchase or acquire, and had never occupied, such land otherwise than by permission of the Government. They were besides estopped by section 116 of the Evidence Act (I of 1872) from disputing the respondent's title.

DeGruyther, K. C., in reply.

1911, JUNE 27TH.—The judgment of their Lordships was delivered by LORD ROBSON.—In form this is an appeal from an interlocutory order of the High Court of Bombay, dated the 12th February 1908, which directed the re-hearing of an appeal from a judgment and decree of the District Judge of Poona, dated the 22nd October 1904, in favour of the appellants, but by an Order of His late Majesty in Council it is in effect an appeal on the merits of the suit from a judgment of the High Court dated the 29th July 1907.

The action was brought by the respondent to eject the appellants from premises known as No. 9, Arsenal Road (formerly known as 23, Staff Lines) within the limits of the Poona Cantonment.

It was claimed on behalf of the Government of Bombay that the land belonged to them and was only held by the appellants on military or cantonment tenure, which entitled

(1) (1837) 2 M. & W. 326 (327). (2) (1860) 8 Moo. I. A. 199 (220).

the Government to resume it at their pleasure, subject to compensation for buildings which the tenants might have erected thereon. The appellants, on the other hand, claimed the land as their private property, and while admitting that they were subject to military jurisdiction in the shape of properly authorised cantonment regulations, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees.

The title of the appellants began with a document dated the 27th August 1861, whereby one I. C. V. Beyts, a Purser in the Indian Navy, certified that for the consideration therein mentioned he "handed over to Dorabjee Pestonjee, Esq., all claim he had to the house, out-houses, and premises, generally marked 23, Staff Lines, Poona Cantonment." This document is endorsed as "sanctioned" by the Brigadier-General Commanding. Its wording appears on the whole to be more consistent with the contention of the Government that the interest of the tenant was that of a licensee of the land with a right to the buildings than with the private ownership in fee alleged by the appellants The appellants, however, assert that the predecessors in title of Beyts were in fact owners of the land at the time the cantonment was established, and that nothing had since happened to vest the title in the Government. In support of this they produce a map of the cantonment dated the 8th February 1823, though possibly made in *1826, in which they show a house standing on the premises* they identify with No. 9, Arsenal Road. They can say nothing as to the tenure on which that land was then held, nor by whom it had been granted, and can only ask the Court to infer that the plot was one of the private properties which they say existed there before the cantonment was formed. But, if that inference be not sustainable, then they contend that they are in actual possession of the land, and that the onus is on the respondent of rebutting the presumption of ownership in fee attaching to the possession of land whether in a cantonment or elsewhere.

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

The Poona Cantonment dates from the year 1817, and was formed after the defeat of the Peishwa at the battle of Kirkee. In exercise of the right of conquest the military authorities at that time marked off a considerable area of land, about 5 square miles (which was cultivated or capable of cultivation only to a very slight extent), for the occupation and convenience of the troops. They soon set about to frame regulations for the appropriation and control of this area. Up to 1834 the Presidency of Bombay was governed by regulations made by the Governor in Council, and the first regulations affecting this cantonment appear to be those issued in 1819. By Bombay Regulation I of 1819, section 4, it is provided that the limits of the cantonments at which any corps or considerable detachment may be quartered shall be fixed by the Commanding Officer in concert with the Zillah Magistrate or Criminal Judge, and directing those authorities to report thereon to the Governor in Council. On the 14th September 1820 the Governor in Council directs the Commander-in-Chief to issue instructions carrying into immediate effect the provisions of Regulation I of 1819.

The precise delimitation of the Poona Cantonment was accordingly then commenced, and the correspondence during the years immediately ensuing (particularly a letter dated the 24th September 1822 from the Collector to the Commissioner) shows that the military authorities were making arrangements and agreements with the owners of the lands belonging to Poona such as would indemnify them for the loss they sustained by being deprived of their rights of occupancy. On the 4th May 1823 the Commissioner, Mr. Chaplin, writes to the Collector to inform him that the whole of the land which had been sketched out as necessary for the cantonment by the military authorities must be given up, and asking for a report on any arrangements that might in consequence be requisite for indemnifying the present holders of the land. It seems reasonably clear, therefore, that from the first the military authorities were conscious, as they would scarcely help being, of the inconvenience and risk of having absolute owners of land within the cantonment, and of the necessity for

propitiating them by proper settlements and compensation. Even if the appellant established that his house was built at or before the time the cantonment was formed, there is still, under the circumstances of the case, a strong probability that he was duly compensated along with other proprietors for the change in his position as owner to that of licensee. This probability is rendered stronger as the history of the Cantonment proceeds.

Bombay Regulation II of 1826, section 21, provides that the limits of cantonments shall be subject to the approval therein mentioned, and adds "in which limits private property is not to be included." Bombay Regulation XXII of 1827, section 21, is to the same effect.

On the 29th September 1827 a Government proclamation was issued for the information of the Poona district, notifying that the cantonment boundaries were fixed, prohibiting cultivation within that area, and warning all persons that the produce of such cultivation would be subject to appropriation without compensation.

It is unnecessary to go in detail through the numerous succeeding regulations which show how strictly the military authorities asserted their proprietary rights. They are summarised in Aitchison's Cantonment Code of 1836, and in Jameson's Cantonment Code of 1850, and they make it clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities. The permission of the Commanding Officer was necessary even for the sale or letting of this house thus built.

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that he or his predecessors in title were owners in fee. The presumption is all the other way, and that adverse presumption is strengthened when the history of the site comes to be examined. It has been traced

1911.

KAIKHUSRU ADERJI v. SECRETARY OF STATE.

to the year 1843, when it was occupied by an army surgeon. It afterwards came into the hands of a contractor, Nundram Sundarji, and in 1860 he is found petitioning the Commander-in-Chief against a proposal by the military authorities to remove his bungalow along with others for various reasons, which illustrated the limited and precarious character of his tenure. Again, in 1882, Adarji Dorabji applied for permission to build a fowl shed on the site, and duly obtained the sanction of the Commander-in-Chief. These circumstances tend to show that the appellants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment.

Their Lordships are of opinion that the appellants are mere licensees, and that the land in question has been lawfully resumed by the Government, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent. *The Solicitor, India Office.*

Appeal dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

1911.
February 3.

IN re GUARDIANS AND WARDS ACT (VIII OF 1890)

AND

In re BAI JAMNABAI, WIFE OF *LILADHAR KHETSEY*, A MINOR, AND HARIDAS NARANJI, PETITIONERS.

Guardians and Wards Act (VIII of 1890), section 12, clause 3 (b)—Power to order money to be paid into Court—Civil Procedure Code (Act V of 1908), section 141, Order XXXIX, rule 10, Order XL, rule 1.

H petitioned the Court under the Guardians and Wards Act, 1890, to be appointed guardian of the property of J, a minor; he also applied to the Court in the following terms:—

"In the meanwhile and pending these proceedings a receiver may be appointed to take charge of the amount of Rs. 4,141-9-1 due and payable to the minor by

G or such other order may be passed to protect the property of the said minor as to this Honourable Court may seem meet."

Held, that it was open to the Court to pass an order directing G to forthwith deposit in Court the sum of Rs. 4,141-9-1 to abide by the further order of the Court.

In the year 1907 a sum of Rs. 4,000 was deposited with Goverdhandas Goculdas Tejpal by Purshotam Vassonji in the name of his minor daughter Bai Jamnabai and an entry was made in the cash books of Goverdhandas which provided that the monies should be repaid when Purshotam Vassonji and Thaker Dhanji Jeram should come together to demand the same. It was subsequently agreed that Liladhar Khetsey should come with Purshotam Vassonji to receive the monies. A *samadaskat* book was also given to Purshotam Vassonji in which a credit entry had been made of the said sum of Rs. 4,000.

On 14th November 1909 a sum of Rs. 4,574-10-9 was due to Bai Jamnabai at the foot of the account.

On 19th July 1910 a sum of Rs. 700 was paid by Goverdhandas out of the monies so deposited with him, and Purshotam Vassonji and Liladhar Khetsey passed a joint receipt for the same.

On the 18th November 1910 Goverdhandas received a letter from Messrs. Mancklal & Co., attorneys for Haridas Naranji, demanding payment of the amount due to Bai Jamnabai at the foot of the account and informing him that they would present a petition to the Court for the appointment of the petitioner as guardian of the property of the minor Bai Jamnabai. They also stated that an application would be made to the Sitting Judge in Chambers the very next day for the appointment of a receiver to take charge of the sum of Rs. 4,141-9-1 due and payable to the minor Bai Jamnabai. On the 19th November 1910 the Court passed an order in the absence of Goverdhandas, directing Goverdhandas to deposit in Court the said sum of Rs. 4,141-9-1 mentioned in the petition to abide by the further order of the Court. Goverdhandas therefore took out a Chamber summons calling upon the petitioner to

1911.

BAI JAMNABAI *In re.*

show cause why the Judge's order of the 19th November 1910 should not be set aside, alleging that he had not appeared at the hearing of the application on the 19th November, since in Messrs. Maneklal's letter to him it was simply stated that an *application would be made for the appointment of a receiver.*

The summons was adjourned into Court for argument.

Raikes for Goverdhandas.

Lowndes for the petitioner.

ROBERTSON, J.—In this case Mr. Goverdhandas Goculdas Tejpal has taken out a summons calling upon one Haridas Naranji to show cause why the order made by me on the 19th of November 1910 should not be set aside The order referred to was made at the instance of the petitioner Haridas Naranji and directed Mr. Govardhandas Goculdas Tejpal to pay into Court the sum of Rs. 4,141-9-1, being the amount due by him to Bai Jamnabai, the minor, at the foot of her *samadaskat* account.

The summons is supported on two grounds: (1) that no notice of the particular order which was made on the 19th of November was ever given to Mr. Tejpal, and (2) that the facts were not fully set before the Court.

As to the notice that was sent, it appears that on the 18th of November a letter signed by Messrs. Maneklal & Co., the petitioner's attorneys, was served on Mr. Tejpal and it distinctly gives him notice that an application will be made the next day to the Sitting Judge in Chambers for an order in terms of prayer (*b*) to the petition. The terms of that prayer (*b*) are set out in the letter and are as follows: "That in the meanwhile and pending these proceedings a receiver may be appointed to take charge of the amount of Rs. 4,141-9-1 due and payable to the minor by Mr. Goverdhandas Goculdas Tejpal or such other order may be passed to protect the property of the said minor as to this Honourable Court may seem meet." It appears to me that Mr. Tejpal has no grievance on the ground that he did not get sufficient notice of the application about to be made. It was impossible for the applicant to know beforehand the exact order that the Judge in Chambers

would be willing to make. As a matter of fact the application that was made was for a receiver and the order that was made was made at the instance of the Court itself.

As to the facts, which are said to have been concealed from the Court, I have considered the petition very carefully and I cannot see that any fact of any real importance was concealed by the petitioner from the Court when the order of the 19th of November was asked for and made.

Turning now to the points of law, which were relied upon as showing that the order of the 19th of November was made without jurisdiction, it was suggested that under section 12 of the Guardians and Wards Act the Court had no power to direct that the property in the hands of Mr. Tejpal and belonging to Bai Jamnabai should be paid into Court. The words of the Act are that the Court " may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." But reliance is placed on clause 3 (*b*) of that section which provides that any person to whom the *temporary custody and protection of the property* of the minor is entrusted is not empowered by anything under that section to dispossess otherwise than by due course of law any person in possession of any of the property.

In the first place as to the power to order the money to be *paid into Court, it is necessary to note the exact circumstances* under which this money came into the hands of Mr. Tejpal. In Exhibit A, to the affidavit of Mr. Tejpal of the 5th of December 1910, is set out the entry in his cash book under date the 9th of August 1907 and it runs as follows :—" Credited to the account of Bai Jamnabai the daughter of Thakar Purshotam Vassonji and Thakar Liladhar Khetsey, Rs. 4,000, *i. e.*, rupees four thousand. The moneys have been deposited as the Palla monies of Bai Jamnabai for making ornaments for her. The same have been credited. This amount is payable when both Thakar Purshotam Vassonji and Thakar Dhanji Jeram come jointly. Interest at annas 8 to be paid." Exhibit B to the same affidavit is a writing dated 22nd March 1909 signed by Dhanji Jeram and is as follows :—" To Shet Goverdhandas Gokuldas

1911.

BAI JAMNABAI *In re.*

Tejpal. Written by Thakar Dhanji Jeram on Ashad Vad 30 Friday, Samvat 1963 (9th August 1907). A sum of Rs. 4,000 has been deposited with you in the name of Bai Jamnabai daughter of Thakar Purshotam Vassonji and wife of Thakar Liladhar Khetsey. The same are desposited for the Palla ornaments on the occasion of her being betrothed to Thakar Liladhar Khetsey. In your books it has been got written by us that the said monies should be returned to me and Thakar Purshotam Vassonji when we jointly approached you. By this *writing* I authorize Thakar Liladhar Khetsey *to join the* said Thakar Purshotam Vassonji in my place and stead and to receive jointly the said monies Samvat 1965, Chaitra Sud 1, 22nd March 1909. (Sd) Thakar Dhanji Jeram by his own hand" Exhibit C is a translation of an entry in Mr. Tejpal's Nondh for October-November 1909, and is as follows:—"Credited to Bai Jamnabai daughter of Thakar Purshotam Vassonji Mudrawalla, Kartak Sud 1st, Sunday, Rs 4,574-10-9, *i. e*, four thousand five hundred and seventy-four annas ten and pies nine Your Palla monies are credited in your and your husband Liladhar Khetsey's account. That account having been closed by your father's request the said amount is credited to you and debited to you and your husband Liladhar Khetsey Until you come of age the said amount is to be payable to both your father the said Thakar Purshotam Vassonji and to your husband the said Thakar Liladhar Khetsey when they come jointly. Interest runs at annas 8. Rs. 4,574-10-9. Debited to Bai Jamnabai and Thakar Liladhar Khetsey. Rs. 4,574-10-9"

In the petition of Haridas Naranji two entries are set out, one of the 18th of July in the *samadaskat* book given by Mr. Tejpal to Bai Jamnabai; the earliest of these is dated the 14th of November 1909 and from that it appears that the balance of Palla money was on that date transferred to the personal account of the minor Bai Jamnabai. The entry is signed by Mr. Tejpal himself. The other entry of the 18th of July 1910, also in the *samadaskat* book, shows that on that *date* the sum of Rs. 700 was drawn from this money and that

the same were credited by the hands of Thakar Purshotam Vassonji and Thakar Liladhar Khetsey. As to how these two persons' names appear in the last entry, it is only necessary to refer to the exhibits to the affidavit of Mr. Tejpal of the 5th of December 1910 which have already been set out.

The result of these entries appears to me to be clear, namely, that this money was paid over by the father of the bridegroom as the Palla monies of the minor Bai Jamnabai to Mr. Tejpal and that after the marriage they were transferred by Mr. Tejpal to the personal account of Bai Jamnabai, it being agreed that the account should be operated upon until the coming of age of Bai Jamnabai by these two persons Thakar Purshotam Vassonji and Thakar Liladhar Khetsey. I consider, under these circumstances, that Mr. Tejpal has definitely acknowledged the amount to be due to the minor Bai Jamnabai; and that being so, the authorities leave no doubt on my mind that the proper order to make is to direct the payment of the money into Court.

I may refer in this connection to Mr. Simpson's Book on Infants, 3rd Edition, at page 315 There he says at the top of the page:—"Where there was any danger that the fund would be lost, or that the trustees would not properly execute the trusts, the old practice seems to have been to require them to give security; but the modern practice is to order the funds to be paid or transferred into Court. It is not necessary to show that the fund is in danger, or that the trustee has abused or intends to abuse his trust; the *cestui que trust* has a right *ex debito justitiæ* to have the fund brought into Court. Applications for this purpose are generally made by summons, and must be founded upon some admission by the person required to make the payment." The cases cited in the foot-note fully bear out the statement of the law contained in the text:—*Richardson* v. *Bank of England*[1], *Dubless* v. *Flint*[2]; *Hagell* v. *Currie*[3].

(1) (18[illegible]) 4 My. & Cr. 16[illegible]

(2) (18[illegible]) 4 My. & Cr. [illegible]

(3) (18[illegible]) L. R. 2 Ch. [illegible]

This English practice appears to be embodied in the Civil Procedure Code in Order XXXIX, rule 10, which provides that "where the subject-matter of a suit is money . . . and any party thereto admits that he holds such money . . . as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court"

I think, however, it is desirable to deal with the argument that was pressed before me on the question as to whether or not the Court had power in such cases to appoint a receiver. As a matter of fact Mr. Tejpal, in his affidavit, upon which he founded his application for this summons, stated in para. 5:—"I did not think it necessary to appear in the notice and incur unnecessary costs as I was not at all concerned with the appointment of a receiver herein." And I understood from his counsel that by that he meant that if a receiver had been appointed he would not have taken objection to the order or sought to have it set aside. However, in the course of the argument on the first point, namely, whether the proper order was to direct the payment of the money into Court, it appeared that his counsel made it a part of his argument that not only did the provisions of section 12 of the Guardians and Wards Act not justify the Court in ordering the money to be paid into Court but that also it had no power to appoint a receiver in such a case. This, of course, he put forward as part of the argument and as a matter of law and not as in any way meaning that his client wished to *resile from the position that he had taken up in his* affidavit. As the matter is one of very great importance in the administration of the Court's jurisdiction in relation to infants, I think it desirable to say that I have no doubt that the Court would have had power in this case to appoint a receiver had it considered it necessary or proper to do so. Turning, again, to the English practice, as stated in Simpson on Infants, at page 352, I find it stated that "though a receiver of an infant's estate may be appointed on petition or summons without suit, yet the more usual course is to appoint a guardian of the person

and estate without receiver.... Under the Judicature Act, 1873, section 25 (8), a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made... The Court is now freed from the old rules as to the time at which and cases in which a receiver would be appointed." Turning to the Code, very wide powers are given to the Court as regards the appointment of a receiver. Section 141 of the Code provides that the procedure laid down in the Code in regard to suits should be followed as far as it can be made applicable in all proceedings of any Court of civil jurisdiction; and having regard to the terms of section 12 of the Guardians and Wards Act that the Court may make such order for the protection of the person and property of the minor as it thinks proper, I am of opinion that section 141 of the Code makes applicable in a proceeding on a petition under that Act the sections and orders dealing with the appointment of the receivers. This view is supported to some extent by the observations of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir-ullah*[1].

Under Order XL, rule 1, where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property, whether before or after decree. The terms of that order could hardly be wider and it appears to me that if the Court is of opinion that it is necessary for the protection of the property of the minor to appoint a receiver, then reading these sections and orders together it has the clearest power to do so. I cannot think that Order XL, rule 1, is confined, as was suggested, to a suit. It is quite true that the words "whether before or after decree" are used in sub-clause (a) of sub-section (1) of Order XL, rule 1. But having regard to what I have already said as to section 141 of the Code, I do not think that the appearance of those words in that Order ousts the jurisdiction of the Court. In my opinion to hold otherwise than as I have done would be to render section 12 of the Guardians and Wards Act practically nugatory. If the Court can neither order the person having the custody of the property

(1) (1894) 17 All. 106.

to pay the money into Court (Order XLIX, rule 10) nor appoint a receiver (Order XL, rule 1) of the property pending the further order of the Court, it is difficult to see what effective means it could take to protect the property if it considered that it was in danger in the hands of the person having possession or custody of the property at the time the application is made to the Court.

The only other point that I think I need notice on this part of the case is the suggestion that the order for payment into Court effected a hardship on Mr Tejpal in that the receipt of the Prothonotary for the money would not be an effectual discharge of his liability to Bai Jamnabai. But I do not think there is any substance in this contention As a matter of fact, if anybody was a trustee of this property it was Mr. Tejpal himself. He had expressly acknowledged that he held the money on account of Bai Jamnabai; and the account stood, so far as can be gathered from the entries to which I have already referred, in the name of Bai Jamnabai It did not stand in the names of the alleged trustees Thakar Purshotam Vassonji and Thakar Liladhar Khetsey. The arrangement that the money was to be paid to them on their joint application was merely one of convenience in order to enable the minor to have the ornaments made for her without waiting until she came of age. But in any case it is obvious that all parties acknowledged that the monies belonged to Bai Jamnabai, whoever held them in trust for her Both Liladhar Khetsey and Purshotam Vassonji had demanded this money from Mr. Tejpal and both those persons consented to the appointment of a guardian of the minor's property for the purpose of recovering this very sum from Mr. Tejpal. This seems sufficient to dispose of any contention of Mr. Tejpal that he was exposed to the risk of further demand if he had complied with the order of the Court.

It was not contended before me that the order had been made wrongly so far as the order was based on the alleged danger to the property. The points that were taken before me were purely legal ones and no point was made that any

false statement had been made to the Court regarding the necessity of some means being taken for the protection of the minor's property.

In my opinion, therefore, there is no ground whatever for setting aside or modifying my order of the 19th of November, and this summons must, therefore, be discharged with costs.

Attorneys for the petitioner: Messrs. *Maneklal & Co.*

Attorneys for Goverdhandas: Messrs. *Bhaishankar, Kanga* and *Girdharlal.*

Summons discharged.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

GHELABHAI GAVRISHANKAR (ORIGINAL PLAINTIFF), APPELLANT, v. UDERAM ICHARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911. July 18.

Civil Procedure Code (Act XIV of 1882), section 539—Trust for public religious purpose—Dedication of property as Shrarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction—Trust created by will—Trust coming into being at a future date—Duty of heirs to carry out the trust—Hindu law—Will.

A suit to eject a trespasser from property, which is the subject of a public religious trust, does not fall within the purview of section 539 of the Civil Procedure Code of 1882.

Lakshmandas Parashram v. Ganpatrav Krishna(1); *Vishvanath Govind Deshmane v. Rambhat*(2); *Kazi Hassan v. Sagun Balkrishna*(3), *Ramchand v. Sonabai*(4), followed.

Where the trustees named by the testator for the purpose of making and completing the trust at the point of time fixed by him are dead, and the object of the trust as named by him is specific and definite, the Court will take the administration of the trust.

[illegible] v. [illegible](5); and *In re Pyne. Lilley v. Attorney-General*(6), followed.

* Second Appeal No. [illegible] of 1910.

(1) [illegible]
(2) [illegible]
(3) [illegible]
(4) [illegible]
(5) [illegible]
(6) [illegible]

1911.

GHELABHAI GAVRISHANKAR v. UDERAM ICHARAM.

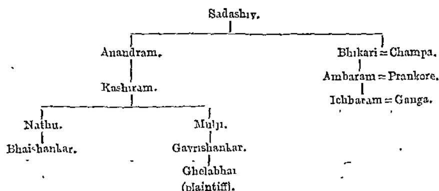
Where a Hindu who has directed a trust of his property for a religious purpose dies before giving effect to it, the Hindu law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser.

Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death, then, until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate, but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. *He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if necessary.* Before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed.

SECOND appeal from the decision of G. D. Madgaonkar District Judge of Surat, reversing the decree passed by N. R. Majmundar, Joint Subordinate Judge at Surat.

Suit to recover possession of property.

Ghelabhai (the plaintiff) sued to recover possession of property; which belonged to one Ambaram, who was related to him as shown in the following genealogical tree:—



Ambaram made his will on the 18th March 1849, whereby he directed that the whole of the property left by him should, on his death, be taken by his wife Bai Prankore; that on her death, Bai Ganga (the widow of a pre-deceased son of Ambaram) should take the property; and that on Bai Ganga's death, the property should be given in *shivarpana* (*i. e.*, dedication to the God Shiva) by the four executors who were named.

Both Champa and Prankore died shortly after Ambaram's death. Ganga lived up to the 15th July 1898. Before that date, the four executors named in Ambaram's will also died.

In 1857, Ganga mortgaged Ambaram's house to meet the expenses of pilgrimage to Benares. This mortgage was redeemed from the sale-proceeds of the house in 1863. The sale was made to Ichharam (husband of Ganga's sister Tapi) the father of defendant No. 1 and grandfather of defendants Nos. 2 and 3, and one Dalpat.

In 1898, the plaintiff filed an application for a certificate of heirship to Ambaram's estate. This application was granted: but the house was excluded from the certificate on the ground that it had been dedicated to the God Shiva.

In 1899, the plaintiff brought a suit against Tapi and Ichharam, to recover possession of Ambaram's property inclusive of the house in dispute. It was held that the gift to Shiva was probably void, but that the mortgage and sale of the house by Ganga was binding on the plaintiff.

In 1907, the plaintiff filed the present suit, claiming, *inter alia*, the following reliefs: (1) That the defendants who were trespassers should be ordered to deliver up possession of the house to the plaintiff and that necessary directions should be given and a scheme framed for carrying out the provision regarding the *shivarpana*; (2) that in case the Court deemed it undesirable to give sole possession to the plaintiff, other gentlemen might be appointed as joint trustees for carrying out of the *shivarpana*; (3) that in the event of the Court considering it inadvisable to give sole or joint possession to the plaintiff other gentlemen might be appointed to carry out the trust; and (4) that the house in dispute might be ordered to be sold and the proceeds ordered to be applied towards the purposes of the *shivarpana*.

The Subordinate Judge held that he had jurisdiction to try the suit as it did not fall within the purview of section 539 of the Civil Procedure Code of 1882; that the plaintiff was entitled to maintain the suit; that the plaintiff was not estopped from trying to enforce the gift to Shiva on the ground that in the previous litigation he had contended that the gift was unlawful and void; and that the house should be given into possession of the plaintiff for the purposes of being appropriated as shivarpana.

1911.

GHELABHAI GAVRI-SHANKAR v. UDERAM ICHARAM.

On appeal, the District Judge held that the Subordina Judge had no jurisdiction to entertain the suit as it fell und section 539. He, therefore, dismissed the suit.

The plaintiff appealed to the High Court.

L. A. Shah for the appellant :—The suit does not fall withi the purview of section 539 of the Civil Procedure Code (A XIV of 1882), its object being to recover the trust propert from outsiders: *Lakshmandas Parashram* v. *Ganpatra Krishna*[1]. Here the property is to be assigned to a religiou purpose, but before it can be so assigned, the trustees died an a third party set up a claim against the trust. The plainti can therefore proceed independently of section 539. See *Ka Hassan* v. *Sagun Balkrishna*[2]; *Muhammad Abdullah Kha* v. *Kallu*[3]; *Jamal-uddin* v. *Mujtaba Husain*[4]; *Strinivas Ayyangar* v. *Strinivasa Swami*[5]; *Ghazaffar Husain Khan* v *Yawar Husain*[6].

Modi, with *N. K. Mehta*, for the respondents :—The suit fall within section 539. Its provisions are mandatory. Se *Tricumdass Mulji* v. *Khimji Vullabhdass*[7]; *Nanpura Pars Panchayat Case*[8]; *Manji Karimbhai* v. *Hoorbai*[9], *Net Rama* v. *Venkatacharulu*[10]. The cases relied on by the othe side were cases in which the relief prayed for was declaratio that the property was a trust property. The case of *Lakshman-das Parashram* v. *Ganpatrav Krishna*[1] was a suit to have the sale of the trust property set aside, which admittedly did not fall under section 539.

CHANDAVARKAR, J.:—The dispute in this case relates to a house, which originally formed part of the property belonging to one Ambaram Bhikariram. He by his will made in the year 1849 bequeathed the property to his wife for life, and, on her

(1) (1884) 8 Bom. 365.
(2) (1899) 24 Bom. 170.
(3) (1899) 21 All. 187.
(4) (1903) 25 All. 631.
(5) (1892) 16 Mad. 31.
(6) (1905) 28 All. 112.
(7) (1892) 16 Bom. 626.
(8) F. A. No. 111 of 1907 (Unreported)
(9) (1910) 35 Bom. 342.
(10) (1902) 26 Mad. 450.

death, to Bai Ganga, his widowed daughter-in-law, also for life; and he further directed that on their death his four executors, named in the will, should make *shivarpana* of the property, that is to say, that they should make a public religious trust of it by devoting it to the worship of the Hindu deity Shiva. On his death, his widow took under the will. On her death, his daughter-in-law succeeded to the estate and she sold the house now in dispute. The present respondents claim to be in possession in virtue of that sale.

The executors, charged with the duty of making a public trust of the property, predeceased the daughter-in-law. She herself died in the year 1898. The trustees, named by the testator for the purpose of making and completing the trust at the point of time fixed by him, having died, and the object of the trust, as named by him, being specific and definite, the case falls within the rule of law, laid down by Lord Eldon in the leading case of *Moggridge* v. *Thackwell*[1], that "where the execution is to be by a trustee, with general or some objects pointed out, *there the Court will take the administration of the trust*." See also *In re Pyne. Lilley* v. *Attorney-General*[2]. It is for such cases that the Indian Legislature provided a remedy by means of section 539 of the old Code of Civil Procedure (Act XIV of 1882), reproduced, with some alteration, in the new Code, (Act V of 1908), as section 92.

In the present case, the suit was brought by the appellant in the Court of the Second Class Subordinate Judge at Surat independently of section 539 of the old Code, which was then in force. In his plaint he sought to eject the respondents as trespassers and prayed for possession of the property, for the appointment of a trustee by the Court, for the settlement of a scheme for the administration of the trust, and for such other relief as the Court might think fit to grant. All the reliefs claimed, except the prayer for possession, fell within the purview of section 539, and to that extent the suit was outside the jurisdiction of the Subordinate Judge's Court, having regard to the law that the provisions of the section are mandatory, not

(1) (1803) 7 Ves. Jun. 36. (2) [1903] 1 Ch. 83.

1911.

GHELABHAI GAVRI-SHANKAR v. UDERAM ICHARAM.

enabling or permissive; *Tricumdass Mulji* v. *Khimji Vullabhdass*[1].

But it is contended for the appellant that, so far as it was a suit to eject a trespasser from property, which is the subject of a public religious trust, section 539 did not apply, and that the suit rightly lay in the Subordinate Judge's Court, as held in *Lakshmandas Parashram* v *Ganpatrav Krishna*[2]; *Vishvanath Govind Deshmane* v *Rambhat*[3], *Kazi Hassan* v. *Sagun Balkrishna*[4]; and *Ravichand Bhaichand* v. *Samal Shivram*[5].

This contention is sound and the present action must be treated as one in ejectment. So regarded, it requires that the appellant must make out his title to eject. The title claimed by him is that of trustee or manager arising in virtue of his right as the heir of Ambaram. There can be no doubt that Ambaram himself could have, if alive, ejected the trespasser and taken steps to complete the trust. "The duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property." (West and Buhler, 3rd Edition, p. 215). Ambaram having named certain persons to carry out the trust pointed out by him, and those persons having all died before the period for the creation and completion of the trust, in the absence of any provision made by the testator to meet such a contingency, the right to do that which those persons would have done devolved, according to Hindu law, on the heir of the testator. He takes either their place or his: *Gossamee Sree Greedharreejee* v. *Rumanlolljee Jossamee*[6]. As observed by this Court in *Ravichand Bhaichand* v. *Samal Shivram*[5], "in the absence of any provision made for the management by the founder or proof of a long established custom with regard to it, the descendants of the founder are entitled to exercise it."

Whatever might be the case as to property which, having been completely devoted by its owner to a public charitable or

(1) (1892) 16 Bom. 626.
(2) (1884) 8 Bom. 365.
(3) (1890) 15 Bom. 148.
(4) (1899) 24 Bom. 170.
(5) (1886) P. J. p. 273.
(6) (1889) L. R. 16 I. A. 137.

religious trust, has passed out of his hands and from his ownership and, therefore, is in no sense under his control or the control of his family and heirs on his death, we have here property of a different character. It is not the case here that the owner died after having made a complete trust of it. He merely directed that it should be endowed for a certain purpose at a certain time by certain persons after his death. Until the arrival of the time and complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate, but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time; and he who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if necessary. But before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed.

To hold otherwise would be contrary to the principles of Hindu law and to encourage the misuse of trust property.

Yajnyavalkya says: "Whatever is promised to be given shall be given; where it has been given, it shall not be resumed." Vijnaneshwara in the *Mitakshara* explains this *Smriti* or text as follows:

"Whatever is promised (as a gift) to any person for a religious purpose should be given to that person (by the promisor); otherwise the latter shall lapse from religion." (The Mitakshara; Moghe's Edition, 3rd, page 225.) So Katyayana as cited in the Mayukha: "If a gift be promised by a person, whether in health or in sickness, for a religious purpose, and he die without making it, his son should be compelled to make it; of this there is no doubt" (Mandlik's Hindu Law, p. 124).

The word "son" is here merely illustrative and stands for anyone who inherits or takes the promisor's property. These are monitory, not mandatory texts; but the principle underlying them is that, where a Hindu, who has directed a trust of his property for a religious purpose, dies before giving effect to

1911.

GHELABHAI GAVRI-SHANKAR *v.* UDERAM ICHARAM.

it, the Hindu Law authorises his heir to take steps for carrying out his directions, after recovering the property from a trespasser.

So far the appellant's title is clear. It remains to consider whether the question of that title is *res judicata* in consequence of the result against him of his suit, No. 360 of 1900, brought against the respondents. That was a suit in which he claimed possession of all the properties of Ambaram, including the house now in dispute, as his reversionary heir. It was held that he was entitled to all of them except the house. As to it, the Court decided that, as it had been made the subject of a gift to the Hindu deity Shiva, it was endowed property, to which the plaintiff had no right as heir and owner. It is true that in both the litigations the appellant claimed as heir. But, as pointed out by the learned Subordinate Judge who tried the present suit, the appellant asks for relief now as trustee with reference to property which is impressed with a trust. As soon as Bai Ganga died, the house became in the eye of law subject to a trust; and Ambaram's heir became entitled to recover it, not as heir, but in a different capacity, *i.e.*, as trustee or manager, for the purpose of giving effect to the trust. The trusteeship, no doubt, arose out of the heirship; but all the same the two capacities or titles are distinct and gave rise to two separate causes of action.

One way of testing it is this. Suppose the trustees named by the testator had survived Bai Ganga. It is undeniable that they could have claimed possession of the house as against a trespasser for the purpose of carrying out the object of the trust pointed out by the testator. At the same time the reversionary heir of Ambaram could have in that event maintained a suit on his own account for the rest of Ambaram's property, to which he had become entitled, either by right of succession under the Hindu Law or under the will. If the two rights were in inception distinct, they cannot be said to have coalesced and become one cause of action merely because one and the same person happens to be the heir and to take the place of the trustees. It is a matter of mere accident, not

1911.

Ghelabhai Gavrishankar v. Uderam Ichharam.

of substance or essence, that the trusteeship arises from the heirship.

For these reasons, the decree of the District Court must be reversed, and, as the pleaders on either side agree that there is no further question on the merits to be determined, the appeal is allowed. The Court doth declare that the property in dispute is a public religious trust under the will of Ambaram Bhikhariram and must be dedicated to the worship of Shiva and that the plaintiff is entitled to recover possession for the purpose of carrying out the said trust according to the directions in the said will. The Court awards possession accordingly. The plaintiff should give an undertaking to the Court of the Subordinate Judge at Surat that within three months from the date of recovery of possession he will take the proper, legal and necessary steps for the purpose of completing the trust and securing its administration. Costs throughout on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.

TRIMBAK BHIKAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHANKAR SHAMRAV *alias* MAHADEO BALVANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1911. *July 20.*

Contract Act (IX of 1872), section 19—Registered deed of gift—Right of revocation not reserved by the donor—Title of the donee—Challenge by a third party having no title.

Though it might be open to a donor, within the time allowed by the law of Limitation, to attack his gift under a registered deed, which reserved no right of revocation, on the grounds mentioned in section 19 of the Contract Act (IX of 1872), still so long as the registered deed stands, the title of the donee under it cannot be challenged by a third party who has no title.

SECOND appeal against the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree of V. R. Kulkarni, Subordinate Judge of Yaval.

* Second Appeal No. 15 of 1910.

1911.

TRIMBAK BHIKAJI v. SHANKAR SHAMRAV.

The property in suit belonged to one Balaji Ganesh, a Deshastha Brahmin. He died without male issue in the year 1902 and his daughter Jiji *alias* Bhikabai succeeded him as heir. On the 25th February 1907 Jiji passed to the plaintiff, her distant cousin, a registered deed of gift of the property inherited by her from her father, and on the strength of the deed the plaintiff brought the present suit against the defendants, who were in possession of the property comprised in the deed of gift, for a declaration that the adoption of defendant 1 by the deceased Balaji Ganesh was invalid, the defendant being sister's son, and for possession.

Defendant 1 contended that he was the duly adopted son of the deceased Balaji and his adoption was valid according to law and custom, that the plaintiff's suit for possession was not maintainable at law unless the defendant's adoption was legally sought to be set aside and cancelled and that the gift to the plaintiff by Jiji was tainted with fraud and could not convey any rights to the plaintiff.

Defendant 2 was absent.

Defendants 3 and 4 stated that they were tenants under defendant 1 and that they would surrender the lands to their lessor on the expiry of the period of tenancy.

The Subordinate Judge found that the gift relied on by the plaintiff was not proved; that the adoption of defendant 1 was proved, but it was invalid, being the adoption of a sister's son and as such *ab initio* invalid according to Hindu Law, the parties being Brahmins; that the plaintiff's grantor was the sole heir of the deceased Balaji; that it was not necessary for the purposes of the suit to set aside the adoption of defendant 1; and that the plaintiff was not entitled to any relief. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge framed three issues, namely: " (1) Is the deed of gift relied on by plaintiff proved to be valid one? (2) Is defendant's adoption invalid? (3) What decree to be passed?" The first issue was found in the negative; no finding was considered necessary on the second issue and the decree was confirmed. In the judgment the

District Judge observed that the deed of gift was proved, but it came into existence under such circumstances that a Court of Justice could not "regard such a deed as valid and enforceable one as against the grantor, nor as against strangers on its being repudiated by the grantor."

The plaintiff preferred a second appeal.

Shortt, with *S. V. Bhandarkar*, for the appellant (plaintiff).

P. P. Khare and *B. V. Vidhvans* for respondent 1 (defendant 1).

SCOTT, C. J.:—In this case the plaintiff sues the defendants for possession of certain property.

The first defendant claims to be the adopted son of a previous owner named Balaji who died in 1902 leaving a daughter named Jiji.

The plaintiff claimed under a deed of gift dated the 25th of February 1907 executed in his behalf by Jiji and alleged that the defendant 1's possession was unlawful in that he was a sister's son of Balaji and therefore one who could not be adopted by Balaji.

The only question which has been argued before us is whether it is open to defendant 1, failing in his defence as to adoption, to set up a case that the plaintiff's deed of gift from Jiji, who was the heir of the last owner, is invalid.

The learned District Judge held that the deed of gift relied upon by the plaintiff is not proved to be a valid one. He found that it was a registered deed and was formally proved, but he said he was not satisfied that Jiji put her signature to it knowing its contents and consequences. He then made a number of observations with regard to the deed which indicate that he had not clearly made up his mind whether the deed from Jiji's point of view ought to be attacked as a sham or *benami* deed passed merely to enable the plaintiff to sue the defendant 1, who was in possession of the property, on Jiji's behalf, or whether it was a deed extracted by the plaintiff in his own interest from Jiji by undue influence or misrepresentation.

1911.

Trimbak Bhikaji v. Shankar Bhamrav.

It appears that Jiji gave evidence on behalf of the defendant 1 who claimed under a title adverse to her, and the learned Judge has held that it was open to defendant 1 when sued for possession to avail himself of such grounds of attack as would have been open to Jiji if she had sued to set aside the deed.

In our opinion, however, it is not open to defendant 1 to take that line of defence. *Ex hypothesi* he is a person who has no title to the property. The plaintiff is a person claiming under a registered deed of gift executed in his favour by the person who is admittedly the heir of the last holder. The plaintiff has, therefore, a *primâ facie* title and must succeed unless the defendant 1 can show some better title in himself. Sir Richard Couch, in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata*[1] which was a possessory action brought by a person with *primâ facie* title, said: "I think that the title which the plaintiff had by the Mokurruree lease and the bill of sale was sufficient to enable him to bring the suit, and that the defendants were not at liberty, in a suit of this description, to raise the question whether he was only nominally the owner of the property, somebody else being the real owner. The difficulties which are suggested in the judgment in the case quoted might all be met without holding that the party who brings the suit and has a *primâ facie* title, is bound to prove that he is the real owner." That case was followed by the Allahabad High Court in *Nand Kishore Lal* v. *Ahmad Ata*[2], where they held that a *benamidar* suing for the recovery of immoveable property on title can sue in his own name, and when such a suit is instituted by a *benamidar* it must be held to have been instituted with consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*.

This Court in *Joitaram* v. *Ramkrishna*[3] has taken the same view of the law without reference to Sir Richard Couch's decision. The learned Judges were there dealing

(1) (1872) 18 W. R. 454. (2) (1895) 18 All. 69.
(3) (1902) 27 Bom. 31 at p. 42.

with the case of a deed of gift which was impugned on the ground that the donee had not acquired possession and they say:

"The defendant 2 preferred to impugn the plaintiff's title on the ground of an alleged defect, which if established would at most have shown that the donors were entitled, and though it is contended that in such case their title would have been time-barred, it would have been difficult to conceive how the possession of defendant 1 could have been adverse to them at a date earlier than that at which it could have become adverse to the plaintiff. So far as they could they completed the gift, the terms of which they embodied in the registered deed, and they have never attempted any reservation or revocation in their own favour, and a stranger cannot challenge its validity as against the donee."

Similarly in the present case the deed reserved to the donor no right of revocation nor has she taken any proceedings within the period allowed by the law of Limitation to set aside the deed on the ground that it was obtained from her under the circumstances mentioned in section 19 of the Indian Contract Act.

For these reasons we hold that the defendant 1 cannot rely upon the ground of attack which might be open to the donor if she sued the donee within the time allowed by the law of Limitation, and that so long as the registered deed stands the title of the donee under it cannot be challenged by a third party who has no title. We, therefore, set aside the decree of the learned Judge.

That, however, does not dispose of all the questions in the case, for, the learned District Judge has not found upon the question raised as to the validity of the first defendant's adoption. He held that no finding was necessary because the deed of gift relied upon by the plaintiff was not proved to be valid.

We, therefore, remand the case for disposal upon the second and third issues as raised by the District Judge.

The District Judge will find himself on those issues and dispose of the case accordingly.

Costs of this appeal must be paid by the present respondent.

Decree reversed. Case remanded.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *July* 31.

MOTILAL VIRCHAND (ORIGINAL DEFENDANT 1), APPELLANT, *v.* THAKORE CHANDRASANGJI HIMATSANGJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree—Execution—Appeal—Surety-bond for restitution—Suit.

Where a bond is passed as security for restitution in the event of the decree being reversed in appeal, a suit based upon such bond can be maintained.

FIRST appeal against the decision of Chunilal Lallubhai, First Class Subordinate Judge of Ahmedabad, in Suit No. 465 of 1907.

The facts were as follows :—

Thakore Mohansangji Hamirsangji brought a suit, No. 18 of 1894, in the Court of the Assistant Judge, F. P., at Broach against Thakrani Bai Jilba *alias* Sahebrani, widow of Thakore Himatsangji Prathisangji, deceased Thakore of Matar, and four others, (1) for a declaration that defendant 2, Chandrasangji, was not the son and heir of the late Thakore of Matar and that he, the plaintiff, was entitled to the property of the deceased Thakore and (2) for recovery of possession with mesne profits from date of suit till delivery of possession of all the moveable and immoveable property attached to the Matar estate. The claim was valued at Rs. 2,33,053-5-4 The Assistant Judge dismissed the suit with costs.

The plaintiff preferred appeal, No. 20 of 1898, to the High Court at Bombay, which, on the 7th March 1899, reversed the decree and awarded the claim for possession of the estate including all property moveable and immoveable.

Respondent-defendant 2, Thakore Chandrasangji, appealed to Her Majesty in Council and applied to the High Court for stay of execution of its appellate decree. The application was refused, but it was ordered that Mohansangji Hamirsangji, the successful appellant-plaintiff, should, before he was allowed to execute the decree, give security to the extent of the moveable

* First Appeal No. 86 of 1909.

property and mesne profits of the immoveable property for three years. In consequence of the said order Hemchand Mulchand and Motilal Virchand executed a bond to the Assistant Judge on the 26th August 1899 as follows:—

In case the order passed by the Honourable High Court in Appeal No. 20 of 1898 be set aside in the appeal preferred by the said defendants to the Privy Council, and the possession of the moveable property is ordered to be restored, then the plaintiff Thakore Mohansangji Hamirsangji shall give back to the defendants the whole of the moveable property of which the plaintiff Thakore Mohansangji Hamirsangji may have come in possession.

On the 30th August 1899 the High Court ordered on the application of Mohansangji that the sum of Rs. 10,000, which had been paid in by the Collector as Manager of the property in suit, should be paid to Mohansangji on the Registrar being satisfied that the security had been furnished.

The appeal to the Privy Council was decided on the 22nd June 1906. The decree of the High Court was reversed and the suit was dismissed with costs: *Chandrasangji Himatsangji* v. *Mohansangji Hamirsangji*[1].

Owing to the successful result of the appeal to the Privy Council, Thakor Chandrasangji Himatsangji brought a suit, on the 5th October 1907, in the Court of the First Class Subordinate Judge of Ahmedabad against the said two sureties Motilal Virchand and Hemchand Mulchand, deceased represented by his legal representatives, for the recovery of the amount of the surety bond, namely, Rs. 10,000 and interest Rs. 5,875, in all Rs. 15,875 with running interest and costs.

The defendants answered *inter alia* that the suit could not be maintained on the security bond.

The Subordinate Judge found that the suit was maintainable and passed the following decree:—

I direct that the plaintiff do recover Rs. 15,875 and costs with running interest at the rate of 6 per cent. per annum from the date of judgment to the date of recovery not exceeding the period of three years from defendant 1 and from the estate of the deceased Hemchand Mulchand. The defendants to bear their own costs.

(1) (1906) 30 Bom. 523.

1911.

MOTILAL VIRCHAND v. THAKORD CHANDRA-SANGJI.

Defendant 1, Motilal Virchand, preferred an appeal.

G. S. Rao (Government Pleader) for the appellant (defendant 1).

G. K. Parekh for the respondent (plaintiff).

SCOTT, C. J. :—On the 21st of June 1899 an application was made to the High Court praying that execution of the decree of the High Court in Appeal No 20 of 1898 from an original decree of the Assistant Judge of Broach might be stayed pending disposal of the appeal preferred by the petitioner to Her Majesty in Council.

The application for stay was refused, but it was ordered that Mohansangji Hamirsangji, the successful appellant to the High Court, should, before he was allowed to execute the decree, give security to the extent of the moveable property and mesne profits of the immoveable property for three years.

In consequence of this order Hemchand Mulchand and Motilal Virchand executed a bond to the Assistant Judge of Broach on the 26th of August 1899 agreeing with the Court as follows:—

"In case the order passed by the Honourable High Court in Appeal No. 20 of 1898 be set aside in the appeal preferred by the said defendants to the Privy Council, and the possession of the moveable property is ordered to be restored then the plaintiff Thakor Mohansangji Hamirsangji shall give back to the defendants the whole of the moveable property of which the plaintiff Thakor Mohansangji Hamirsangji may have come in possession."

Now after the execution of that bond an application for execution which had been filed by Mohansangji was dismissed by the District Judge on the ground that it was not in proper form, and on the next day, the 31st of August 1899, the High Court ordered on an independent application of Mohansangji that the sum of Rs. 10,000 which had been paid in by the Collector as Manager of the property in suit should be paid to Mohansangji on the Registrar being satisfied that the security had been furnished.

The appeal to the Privy Council was successful and the present suit was filed to recover the sum of Rs. 10,000 paid to Mohansangji as above stated.

The defendants are the executants of the surety bond.

1911.

MOTILAL VIRCHAND *v.* THAKORE CHANDRASANGJI.

Two points have been taken in objection to the suit. First, it is said that the obligee of the bond must proceed in execution against the obligor where the bond is passed as security for restitution in the event of a decree being reversed, and that no suit based upon such a bond can be maintained, and secondly, it is said that if the first objection is a good one the Court would be prevented by considerations of jurisdiction from converting this suit into a proceeding in execution to enforce the bond against the surety.

To deal with the last point first, the defendants live in Ahmedabad and in consequence of their residence in that district they have been sued in the Court of the First Class Subordinate Judge of Ahmedabad. The decree has to be executed in the first instance by the District Court of Broach, and has not been transmitted for execution to the Court of the First Class Subordinate Judge, Ahmedabad: therefore, it is said, there is an objection to converting the suit into a proceeding in execution.

In the view that we take of the case that objection cannot prevail, for, we think that assuming that the bond could be enforced by a proceeding in execution, it is not necessary for the obligee to resort to that procedure. He may file a suit upon the contract contained in the bond.

That was the view which was taken many years ago by the Allahabad High Court in *Abdul Kadir* v. *Baboo Hurree Mohun*[1], and it is a view which does not appear to have been controverted definitely in any of the many subsequent decisions to which reference has been made.

Reliance is placed upon the decisions of this High Court in *Venkapa Naik* v. *Baslingapa*[2], *Kusaji* v. *Vinayak*[3], and *Jamsedji* v. *Bawabhai*[4], and we are asked to infer from them that this suit will not lie. We do not think that any such inference can be drawn. In *Venkapa Naik* v. *Baslingapa*[2], the Subordinate Judge was of opinion that the provisions of

(1) (1874) 6 N.-W. P. H. C. R. 261.
(2) (1887) 12 Bom. 411.
(3) (1898) 23 Bom. 478.
(4) (1900) 25 Bom. 403.

1911.

MOTILAL VIRCHAND v. THAKORE CHANDRASANGJI.

section 253 of the Code of Civil Procedure of 1882 could not be extended in their operation to the case of a person who became a surety for the fulfilment of the decree in appeal. He held that the proper mode of proceeding against the surety was by a regular suit and not by a summary process in execution, and he, therefore, refused to issue execution against the surety. On appeal it was contended on behalf of the appellant that there was nothing to be gained by driving the decree-holder to a regular suit against the surety, that it would be only prolonging litigation unnecessarily, and that the authorities showed that the liability could be enforced by proceeding in execution. Mr. Justice West in delivering the judgment of the Court said: "The cases cited in argument make it clear that under Act VIII of 1859 and the supplemental Act XXIII of 1861, the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit," and he held that there was no objection to following the same procedure in cases under section 546 as under section 253.

In *Kusaji* v. *Vinayak*[1], there is a *dictum* of Mr. Justice Parsons that this Court had decided that the mode of enforcing payment by surety is by summary process in execution and not by means of a separate suit. That is an inaccurate statement of what was said by Mr. Justice West in *Venkapa Naik* v. *Baslingapa*[2]. It omits the word "ordinary" which in connection with the argument addressed to us is very material. There is nothing in the decision in *Venkapa Naik* v. *Baslingapa*[2], which should induce us to hold that a suit will not lie to enforce the surety bond even in a case where the ordinary mode of proceeding would be in execution.

Under the present Code of Civil Procedure where any person has become liable as surety for the performance of any decree or for the restitution of any property taken in execution of a decree, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and

(1) (1898) 23 Bom. 478. (2) (1887) 12 Bom. 411.

such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

That, however, does not, we think, involve the conclusion that a suit cannot be filed upon the contract created by the surety bond.

We therefore agree with the learned Subordinate Judge in thinking that this suit will lie.

Then it is contended that the Rs. 10,000, the recovery of which is the object of the suit, is not money realized in execution and therefore the sureties are not liable to restore it.

It is to be observed, however, that the sureties do not confine their liability to money realized in execution, but they contract that the plaintiff Mohansangji shall give back to the defendants the whole of the moveable property of which the plaintiff may have come in possession. These words cover, in our opinion, the Rs. 10,000. We affirm the decree and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911. *July* 31.

CHUNILAL VIRCHAND (ORIGINAL PETITIONER), APPELLANT, v. THE AHMEDABAD MUNICIPALITY (ORIGINAL OPPONENT), RESPONDENT.*

Bombay District Municipal Act (Bombay Act III of 1901), section 160†—Municipality—Compulsory acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of statutes.

No appeal lies from the decision of a District Court under clause (3) of section 160 of the Bombay District Municipal Act (Bombay Act III of 1901).

---

* First Appeal No. 200 of 1910.

† The section runs as follows:—

160. (1) If a dispute arises with respect to any compensation, damages, costs or expenses which are by this Act directed to be paid, the amount, and if necessary, the apportionment of the same, shall be ascertained and determined

1911.

CHUNILAL VIRCHAND v. AHMEDABAD MUNICIPALITY.

Where a statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed.

Wolverhampton New Waterworks Co. v. *Hawkesford*(1), followed.

APPEAL from the decision of Dayaram Gidumal, District Judge of Ahmedabad.

The Municipality of Ahmedabad acquired compulsorily some lands belonging to Chunilal Virchand (the applicant).

The applicant applied to the District Judge of Ahmedabad, under section 160 of the Bombay District Municipal Act, 1901, to fix compensation for the land.

The District Judge made an inquiry and fixed the compensation at Rs. 1,015-13-4.

The applicant appealed to the High Court against the decision.

At the hearing, a preliminary objection was raised on behalf of the respondent that no appeal lay.

---

by a panchâyat of five persons, of whom two shall be appointed by the municipality, two by the party (to or from whom such compensation, damages, costs or expenses may be payable or recoverable) and one, who shall be sir-panch, shall be selected by the members already appointed as above.

(2) If either party, or both parties fail to appoint members, or if the members fail to select a sir-panch within one month from the date of either party receiving written notice from the other of claim to such compensation, damages, costs or expenses, such members as may be necessary to constitute the panchâyat shall be appointed, at the instance of either party, by the District Judge.

(3) In the event of the panchâyat not giving a decision within one month from the date of the selection of the sir-panch, or of the appointment by the District Court of such members as may be necessary to constitute the panchâyat, the matter shall, on application by either party, be determined by the District Court which shall, in cases in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court:

Provided that—

(a) no application to the Collector for a reference shall be necessary, and

(b) the Court shall have full power to give and apportion the costs of all proceedings in any manner it thinks fit.

(1) (1859) 6 C. B. N. S. 336.

L. A. Shah, for the respondent, in support of the preliminary objection :—The order is passed under clause (3) of section 160 of the Bombay District Municipal Act (Bombay Act III of 1901) ; and no appeal lies against it. Section 54 of the Land Acquisition Act (I of 1894) does not apply, as a right of appeal is not a matter of procedure. The right is the creation of statute and must be expressly given. See *Narayan Ballal* v. *Secretary of State for India*[1] ; and *Poona City Municipality* v. *Ramchandra*[2].

G. N. Thakore, for the appellant :—Under section 81 of the earlier District Municipal Act (Bombay Act VI of 1873) the order passed was appealable. See *The Collector of Poona* v. *Ramset*[3]. The present section 106 makes no difference as regards the right of appeal, as the word "proceedings" is wide enough to include the right of appeal. Further, section 54 of the Land Acquisition Act (I of 1894) applies, which gives a right of appeal. Again, the order awarding compensation is a decree and as such is appealable. Refers to *Meenakshi Naidoo* v. *Subramaniya Sastri*[4].

CHANDAVARKAR, J. :—The preliminary question arising in this case is, whether there is an appeal from the decision of a District Court under clause (3) of section 160 of the Bombay District Municipal Act (Bombay Act III of 1901).

That section provides a remedy for the determination of the amount of compensation, to which a person becomes entitled under clause (3) of section 92 of the Act, by reason of his land forming part of a public street and becoming vested in the Municipality in virtue of the last portion of the first clause of that section. Both the right to compensation and the remedy for the determination and apportionment of its amount are given by the Act itself; so the right must be asserted and the remedy pursued only in the manner and upon the conditions prescribed by the Act. This is on the well known rule of law that, where a statute creates a right not existing at common

(1) (1895) 20 Bom. 803.
(2) (1908) 10 Bom. L. R. 617.
(3) (1870) P. J. 120.
(4) (1887) L. R. 14 I. A. 160.

1911.

CHUNILAL VIRCHAND v. AHMEDABAD MUNICIPALITY.

law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed: per Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*[1].

The question then is, whether section 160 of the Bombay District Municipal Act, which constitutes the District Court the tribunal for the determination of the amount of compensation, gives a remedy by way of appeal from that Court's order made under clause (3) of that section. If that section does not give the right, it is admitted that there is no other section in the Act which gives it. A right to appeal cannot be assumed "in every matter which comes under the consideration of a Judge; such right must be given by statute or by some authority equivalent to a statute": *Meenakshi Naidoo* v. *Subramaniya Sastri*[2]. In terms section 160 does not provide an appeal. Nor can it be said that it is provided by necessary implication. Clause (1) of the section directs that the amount of compensation shall be determined in the first instance by a pancháyat appointed by the parties. Clause (2) provides that if they fail to appoint, the District Judge shall make the appointment at the instance of either party. It is not, and can hardly be, contended that where a pancháyat, appointed under either of the said clauses, has determined the amount of compensation, its award can be questioned by way of appeal to a Court of law. Clause (3) of the same section provides that if the pancháyat appointed under either clause (1) or clause (2) fails to give a decision within the period fixed in the clause, the District Court shall determine the amount on application by either party. It will thus be seen that the Court in question comes in as a substitute for the pancháyat where adjudication by the latter has failed. What applies to the latter in the matter of appeal must apply, therefore, to the former, on the principle of the legal maxim "*noscitur a sociis*." So far the necessary implication in section 160 is against a right of appeal.

Further, clause (3) of section 160 directs that the District Court shall "follow as far as may be the procedure provided by the Land Acquisition Act (1 of 1894)" in determining the

(1) (1859) 6 C. B. N. S. 336. (2) (1887) L. R. 14 I. A. 160 at p. 165.

amount of compensation. That means that only those provisions of the latter Act apply to the proceedings before the District Court, which regulate its procedure in land acquisition cases. The said provisions do not include, but stand apart from, the provision relating to an appeal against an award made by a District Court under the Land Acquisition Act. The right to appeal from the award is specifically given by section 54 of that Act. That section is, therefore, excluded from the purview of section 160 of the Bombay District Municipal Act.

There are two provisoes to clause (3) of this latter section. The first says that no application to the Collector for a reference to the District Court of the question as to the amount of compensation, such as is required under the Land Acquisition Act to give jurisdiction to that Court in land acquisition cases, shall be necessary where the same Court has to determine the amount of compensation under the said clause (3). By this proviso section 18 of the Land Acquisition Act, which would have otherwise applied to the proceedings before the District Court under that clause as part of the procedure to be followed, is made inapplicable to those proceedings. So, again, the second proviso to clause (3) of section 160 says that the District Court "shall have full power to give and apportion the costs of all proceedings in any manner it thinks fit." But for this proviso, section 27 of the Land Acquisition Act, which points out how the District Court shall make an order as to costs in land acquisition cases, would have applied to the proceedings before the District Court under clause (3) of section 160 of the Municipal Act as part of its procedure. So careful has the Legislature been to limit the application of the provisions of the Land Acquisition Act to the proceedings in the District Court under clause (3) of section 160 of the Municipal Act that the implication is distinctly against a right of appeal from any decision of that Court made under that clause.

It was contended before us by the learned pleader for the appellant that such right existed under the Code of Civil Procedure because that Code gave an appeal against a decree of every Court. But it is taking a long stride in logic to infer from that that there is an appeal from an order made by the

1911.

CHUNILAL VIRCHAND v. AHMEDABAD MUNICIPALITY.

District Court under clause (3) of the Bombay District Municipal Act. An order made under the said clause is not a decree, because it is made, not under the ordinary civil jurisdiction, but under a special jurisdiction created by a special Act, and that Act does not say that such an order is a decree.

This conclusion is supported by the decision of the Judicial Committee of the Privy Council in *Meenakshi Naidoo* v. *Subramaniya Sastri*[1], on the construction of a somewhat similar section (section 10) in Act XX of 1863, which relates to the management of religious endowments. That Act provides for the supplying of vacancies among the members of Temple Committees by election, where the election fails, it says, "the Civil Court, on the application of any person, may appoint a person to fill the vacancy" It was held that an order by the Civil Court made under that provision was not appealable, because there was nothing in the provisions which conferred a right of appeal. With reference to the argument that though the Act gave no such right it must be found in the general law, *i. e.*, the Code of Civil Procedure, their Lordships held that an order under section 10 of Act XX of 1863 was not a decree within the meaning of the Code (Act X of 1877 as modified by Act XII of 1879), because a decree was defined to mean "a formal expression of an adjudication upon any right, claim, or defence, set up in a Civil Court where such adjudication decides the suit or the appeal." "In the opinion of their Lordships, there was no civil suit respecting the appointment" made by the Court under section 10 of Act XX of 1863. In the present Code (Act V of 1908) a decree is defined to mean an adjudication in a suit. A proceeding under clause (3) of section 160 of the Bombay District Municipal Act is initiated, not by suit, but by application, and a decision passed in it is at best an award on the analogy of the Land Acquisition Act, so far as the provisions of the latter apply to the former.

For these reasons this appeal must be dismissed with costs, on the ground that it does not lie.

Appeal dismissed.

R. R.

(1) (1887) L. R. 14 I. A. 160.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

PIROJSHAH BHIKAJI VANDRIVALLA (ORIGINAL DEFENDANT No. 19), APPELLANT, v. MANIBHAI NICHHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.* 1911. *August 1.*

VASANJI KALLIANJI AND OTHERS (ORIGINAL DEFENDANTS Nos. 1, 6, 12 AND 11), APPELLANTS, v. MANIBHAI NICHHABHAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS Nos. 2 TO 5, 8, 9, 10, 14 AND 19), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 13, 462—Res judicata—*Consent decree—Lands—Tenants-in-common paying land revenue jointly to Government—Lands do not thereby become impartible—Compromise—Minor—Sanction of Court.*

A suit for the partition of a village was resisted on the plea that the village was impartible, first, because the arrangement with Government had all along been that the tenants-in-common should be jointly responsible to Government for the land revenue, and, secondly, because in a previous suit between the parties it was held that the lands in the village were not divisible, only the profits thereof were. The previous suit was decided in terms of a compromise A minor was a party to it. The guardian of the minor had applied to the Court stating that he had no objection to keep all the lands joint provided the minor got his share of the profits; and the Court had made the endorsement that the application had been allowed and filed in the suit.—

Held, overruling the plea, that the arrangement settling the relations between Government and the tenants-in-common could not be regarded as determination of the relations between the tenants *inter se.*

Held, further, that the decision in the previous suit was passed in terms of a compromise, but there was no issue raised and no adjudication on the issue whether the village was impartible.

Held, also, that the Court's sanction had not been obtained, under section 462 of the Civil Procedure Code (Act XIV of 1882), to the compromise to which a minor was a party.

The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or by some general, family or local custom. Parties cannot make an estate impartible which is partible. It is opposed to public policy.

Vinayak Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar[1], followed.

FIRST appeals from the decision of J. L. Thakore, Joint First Class Subordinate Judge, A. P., at Surat.

* First Appeals Nos. 18 and 39 of 1909.

(1) (1903) L. R. 30 I. A. 77.

1911. Suit for partition and accounts.

PIROJSHAH v. MANIBHAI.

The lands sought to be partitioned were situated in the village of Jamalpur, in the district of Surat. The plaintiff had $\frac{11}{48}$th share in the lands which he held in common with defendants Nos. 1—18. The remaining defendants were alienees of the foregoing defendants.

In 1891, one of the tenants-in-common had filed a suit in the District Court of Surat against the present plaintiff (who was a minor and who was represented by the Collector of Surat as his guardian) and others to recover his share by partition of the lands. The defendants denied the right claimed by the plaintiff there. Later on, the parties arrived at a compromise, under which they agreed to divide the profits of Jamalpur lands etc. hereditarily according to their shares. The Collector, on behalf of his minor ward, gave an application that he had no objection to keep all the lands joint provided his ward got his share in the profits. The Court made an endorsement on this application, that "the application has been allowed and filed in the suit". A decree was eventually passed in terms of the compromise.

In 1891, the defendant No 1 (a co-sharer) took the village of Jamalpur in lease from all the co-sharers for a fixed period of nine years, agreeing to distribute Rs. 1,500 among the co-sharers after deducting expenses from it.

In 1905, the defendants Nos. 1—6 leased the village to defendant No 19 for a period of 10 years at the annual rental of Rs. 1,600, exclusive of Government assessment.

In September 1905, the plaintiff filed the present suit praying *inter alia* for a declaration that the lease was void as against him and for recovering his share by partition in the Jamalpur lands. He urged that the decree of 1891 did not bind him, as it was based on a compromise to which sanction of the Court as provided for by section 462 of the Civil Procedure Code of 1882 was not taken. The Subordinate Judge held that the lease of 1905 was not binding on the plaintiff; that there was no substance in plaintiff's contention as to sanction under section 462 and that the decree in question

was merely declaratory and did not prohibit a partition in future. He, therefore, awarded the plaintiff's claim.

Defendants Nos. 1, 6, 11, 12 and 19 appealed to the High Court.

G. K. Parekh and *R. R. Desai* for the appellants:—The village of Jamalpur is impartible because it is a Bandhi Jama village and also it is a Bhagdari village: see *The Government of Bombay* v. *Haribhai Monbhai*[1] and *The Government of Bombay* v. *Sundarji Savram*[2]. The assessment is payable to Government by all the co-sharers jointly: it would therefore be wrong to allow a partition. The sharers might lose the village for the default of a single co-sharer.

The arrangement decreed in 1891 was intended to be permanent. As the decree is in force the present suit is barred by *res judicata*. The lease of 1905 must be upheld; it has been given *bonâ fide* in the interests of all the co-sharers: see *Balvantrav Oze* v. *Ganpatrav Jadhav*[3].

Branson with *Manubhai Nanabhai* for respondent No. 1.

Nandavadan K. Mehta for respondents Nos. 2, 3, 7, 9.

The respondents were not called upon.

CHANDAVARKAR, J.:—The first question is whether this is an impartible village. It is argued that it is, because its tenure is Bhagdari. In the Court below no point would appear to have been made that the village, being Bhagdari, could not be partitioned by metes and bounds. The question as to its impartibility was rested there by the appellant on other grounds. Whether the village is Bhagdari or not must be determined on evidence, and we should not be justified in deciding the case on that point, raised as it is for the first time in appeal. But the appellant's pleader has referred to certain documentary evidence to show that the point was present to the minds of the parties in the Court below and was raised there. That evidence consists of judgments in what are known as the Kabilpur, Jamalpur, and Visalpur cases. In the judg-

(1) (1875) 12 B. H. C. R. Appx. 225, 227. (2) (1879) P. J. 333, 334.
(3) (1883) 7 Bom. 330.

1911.

PIROJSHAH v. MANIBHAI.

ments relating respectively to the first and the last, there is a reference to the fact of these villages being either Bhagdari or similar to Bhagdari; but the judgment (Exhibit 258) relating to Jamalpur, which is the village concerned in the present case, is silent as to that. The materials before us are too meagre to enable us to decide the question satisfactorily, and they are meagre, because it was either not raised in the lower Court, or, if raised, it was not sufficiently prosecuted. If the village is in fact held on the Bhagdari tenure, our decision upholding the lower Court's decree directing partition will not necessarily prejudice the appellant, because it is open to the Collector to intervene under the Bhagdari Act and take steps to prevent a partition of the village.

Failing on the point abovementioned, the appellant's pleader urges that the village is impartible, first, because the arrangement with Government has all along been that the tenants-in-common should be jointly responsible to Government for the land revenue payable to the latter; and secondly, because in a previous suit between the parties it was held that the lands in the village were not divisible, only the profits thereof were. As to the first of these grounds, no arrangement settling the relations between Government and the tenants-in-common can be regarded as determinative of the relations of the tenants *inter se.* As to the second ground, the decision in the previous suit was passed in terms of a compromise that the profits should be divided. There was no issue raised, no adjudication on the issue whether the village was impartible. The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or some general, family, or local custom: *Vinayak Waman Joshi Rayarikar* v. *Gopal Hari Joshi Rayarikar*[1]. Parties cannot make an estate impartible which is partible. That is opposed to public policy. Besides, the decision relied upon seems to have been made in terms of a

(1) (1903) L. R. 30 I. A 77.

compromise in which a minor was concerned. The Court's sanction ought to have been obtained to its terms being for the benefit of the minor, under section 462 of the Code of Civil Procedure (Act XIV of 1882) then in force. No such sanction is proved by the record to have been obtained in the manner prescribed by the provisions of section 462. So the argument of *res judicata* fails. The lease by defendants Nos. 1 and 6 to defendant No. 9 was plainly in violation of the long practice as to management, enjoyment and leasing which had obtained among the co-sharers; the lease in question was made without the consent of the other co-sharers; and was, as found by the lower Court, not beneficial to them. The authorities cited by Mr. Gokuldas to show that a lease by one co-sharer binds the other co-sharers unless it has done substantial injury to the latter or led to the destruction of the property, are inapplicable here, where it is found—and found rightly—by the lower Court upon unimpeachable evidence that all the co-sharers had been letting out the lands jointly before this lease by defendants Nos. 1 and 6. As to the deduction of Rs. 12 from the share of Surbhai and Rs. 40 out of the revenue of the Hoonda lands, we concur with the Subordinate Judge both in his reasons and conclusion. We cannot interfere with the order as to costs made by the Court below in its decree. The plaintiff alone asked for his share by partition. The defendants strenuously opposed his right. The case is thus taken out of the rule that where there is a general partition, the costs of all the parties should come out of the estate.

In appeal No. 18, by defendant No. 19, he has been held rightly liable for mesne profits after suit.

The decree is confirmed and both the appeals are dismissed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911 *August 3.*

KASSUM GOOLAM HOOSEIN VAZIR (ORIGINAL OPPONENT-DEFENDANT), APPELLANT, *v.* DAYABHAI AMARSI, ASSIGNEE OF BHANJI RAVJI KHOJA (ORIGINAL APPLICANT-PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 16—Decree—Assignment—Application for execution—Attachment before hearing judgment-debtor's objections—Notice to assignor and judgment-debtor—Attachment proceedings not merely irregular but illegal.

The transferee of a decree having preferred a *darkhast* for execution, the judgment-debtor's property was attached in his shop by seizure before hearing his objections. The next day an order was made on the application of the judgment-debtor that the property should not be removed until his objections had been heard. Subsequently the Court heard the judgment-debtor's objections and held that the transferee was entitled to execution of the decree against the judgment-debtor, the omission to hear the judgment-debtor's objections was a mere irregularity and proceedings in attachment should not be set aside.

Held, reversing the order and dismissing the *darkhast*, that legislature having provided that the decree should not be executed until the objections had been heard, the proceedings were unlawful and not merely irregular as the objections of the judgment-debtor had not been heard.

SECOND appeal against the decree of C. E. Palmer, District Judge of Thana, confirming the order passed by S. S. Wagle, First Class Subordinate Judge of Thana, in an execution proceeding, *darkhast* No 91 of 1910.

One Bhanji Ravji Khoja obtained a decree, No. 117 of 1905, against the defendant Kassum Goolam Hoosein Vazir for the recovery of Rs. 800. The decree was dated the 11th August 1905 and it was subsequently assigned by the decree-holder to Dayabhai Amarsi. On the 11th June 1910 the assignee preferred a *darkhast*, No. 91 of 1910, in the Court of the First Class Subordinate Judge of Thana, praying for the recovery of Rs. 1,167-8 due under the decree from the defendant personally and by the attachment and sale of his moveable property. On the 18th June 1910 the assignee put in an affidavit stating that the defendant was about to close his shop and run away from Bandora, where he lived, and applied that the order for

* Second Appeal No. 181 of 1911.

attachment should be issued along with the notices under Order XXI, Rule 16 of the Civil Procedure Code (Act V of 1908). The property was consequently attached in the defendants' shop on the 20th June 1910. On the next day, that is, on the 21st June 1910, the defendant made an application stating that the attachment was illegal and should be set aside. The Court, thereupon, made an order that further proceedings should be stopped and set down the defendants' application for hearing on the 26th June 1910. On that day certain affidavits were put in to show that the defendant was a respectable man and had no intention of absconding. Witnesses were examined at intervals and on the 6th August 1910 the Subordinate Judge found that there were not sufficient grounds for an immediate attachment. He, therefore, disallowed the costs of the attachment but directed that the attached property be sold.

On appeal by the defendant the District Judge confirmed the order observing :—

As the notices required by Order XXI, Rule 16, and Order XXI, Rule 22, were issued and after the attachment had been made no further steps were ordered to be taken till appellant had been heard, I am not prepared to hold that the order eventually passed was wrong or must be set aside because of the initial irregularity, if there was one, in making an attachment after judgment.

The defendant preferred a second appeal.

Manubhai Nanabhai for the appellant (opponent-defendant) :—The Court should not have issued the attachment before hearing our objections. The terms of Order XXI, Rule 16 of the Civil Procedure Code are clear. Its provisions are obligatory. Non-compliance with them is not a mere irregularity which can be cured by section 99 of the Code, nor can section 151 of the Code enable the Court to go against the express provisions of Order XXI, Rule 16 : *Gulzari Lal* v. *Daya Ram*[1]. The rulings under section 248 of the old Code of 1882 where similar language had been used show that proceedings in violation of the provisions of that section were held to be illegal.

Coyaji with *V. G. Deshpande* for the respondent (applicant-plaintiff) :—Notices had been issued and objections on the

(1) (1886) 9 All. 46.

1911.

KASSUM GOOLAM HOOSEIN v. DAYABHAI AMARSI.

merits were heard and over-ruled. The defendant has not, therefore, been prejudiced. The matter was urgent and the Court must have some power to attach the judgment-debtor's property if he is about to abscond. If the Court has power to grant attachment before judgment, it has the same power after decree: section 151 of the Civil Procedure Code. Merely attaching the property does not amount to execution of the decree as contemplated by Order XXI, Rule 16, Rule 24.

SCOTT, C. J.—In this case a *darkhast* for execution was applied for by the assignee of the decree.

Rule 16 of Order XXI provides that where a decree is transferred by assignment, the transferee may apply for execution of the decree and the decree may be executed as if the application had been made by the decree-holder subject to this proviso, *that where the decree has been transferred by assignment*, notice of the application for execution shall be given to the transferer and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections, if any, *to its execution*.

Being aware of the provisions of that rule the transferee applied on the 18th of June 1910 for notices to the transferer and the judgment-debtor. He applied at the same time for *attachment by seizure of the goods of the judgment-debtor in* his shop. On the same day notices were issued by the Court and also a warrant of attachment. Before any objection had been heard on the part of the judgment-debtor the property was *attached in his shop by seizure by the Sheriff's officer on the* 20th of June 1910.

Then on the 21st of June an application was made by the judgment-debtor to the Court and an order was made that the bailiff should not remove the property until after the objections had been heard.

The hearing of the objections commenced on the 26th of June and the hearing was *concluded on the 6th of August.* The Court then held that the plaintiff was entitled to execution of the decree against the judgment-debtor. Thus, it appears that the property of the judgment-debtor had been attached

1911.

KASSUM GOOLAM HOOSEIN v. DAYABHAI AMARSI.

in execution for a month and a half before his objections had been finally heard. The attachment was effected in the manner most prejudicial to the reputation of the defendant by the open seizure of the goods in his shop. It has been held, however, by the lower Courts that although the provisions of the Code have been violated to the great prejudice of the defendant, it is a mere irregularity and the proceedings in attachment should not be set aside. We cannot agree in this view. The legislature has provided in express terms that the decree shall not be executed until the objections have been heard. One of the modes provided by the Code for execution of decrees is by attachment and sale of the property. The execution of the decree had commenced by the attachment. We think that this was unlawful and not merely irregular as the objections of the judgment-debtor had not been heard.

We, therefore, set aside the order of the lower appellate Court and dismiss the *darkhast* with costs throughout upon the decree-holder.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMJI KUBER (ORIGINAL PLAINTIFF), RESPONDENT.*

1911. *August 3.*

District Municipal Act (Bom. Act III of 1901), section 96, sub-sections (2), (3) (a), (4) (a) (ii) and (5)[1]*—Application to Municipality to reconstruct a house, building balconies—"Permission note" to rebuild the house—Permission to build balconies indefinitely delayed—Building of balconies—Indefinite delay inconsistent with the District Municipal Act (Bom. Act III of 1901).*

On the 3rd July 1903 the plaintiff applied to the Ahmedabad Municipality for permission to reconstruct his house, building balconies on its two sides. On the

---

* Second Appeal No. 909 of 1909.

(1) Section 96, sub-sections (2), (3) (a), (4) (a) (ii) and (5) of the District Municipal Act (Bom. Act III of 1901) :—

96. (1) Before beginning to erect any building, or to alter externally or add to any existing building, or to reconstruct any projecting portions of a building in

1911.

AHMEDABAD MUNICIPALITY v. RAMJI KUBER.

25th July 1903 the Municipality issued a "permission note" giving the plaintiff permission to rebuild his house and informing him that as regards the building of the balconies his application was placed before the Managing Committee and that until the permission was granted he must not do any work in that respect. The plaintiff not having heard from the Municipality, he built the balconies. On the 4th August 1904 the Municipality called upon the plaintiff to remove the balconies, and his application to the Municipality to reconsider their decision having failed, he brought a suit against the Municipality for an injunction restraining them from removing his balconies.

---

respect of which the Municipality is empowered by section 92 to enforce a removal or set-back, the person intending so to build, alter or add shall give to the Municipality notice thereof in writing, and shall furnish to them, at the same time if required by a by-law or by a special order to do so,

(a) the sanad, if any * * * * * *

(b) a plan showing the levels * * * * *

(2) The Municipality may issue such orders not inconsistent with this Act as they think proper with reference to the work proposed in such notice, and may either give permission to erect or alter or add to the building according to the plan and information furnished, or may impose in writing such conditions as to level, drainage, sanitation, materials or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation, or with reference to the location of the building in relation to any street existing or projected, as they think proper, or may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction.

(3) Before issuing any orders under sub-section (2) the Municipality may, within one month from the receipt of such notice, either issue,

(a) a provisional order directing that for a period, which shall not be longer than one month *from the date of such order, the intended work shall not be* proceeded with, or

(b) may demand further particulars.

(4) A building proposed in a notice given under sub-section (1) may be proceeded with in such manner, as may have been specified in such notice, as is not inconsistent with any provision of this Act or of any by-law for the time being in force thereunder in the following cases, that is to say:—

(a) in case the Municipality, within one month from the receipt of the notice given under sub-section (1), have neither

(i) * * * * * * * *

(ii) issued under sub-section (3) any provisional order or any demand for further particulars.

1911.

AHMEDABAD MUNICIPALITY v. RAMJI KUBER.

Held, that the plaintiff was entitled to succeed. There being no subsisting provisional order referred to in section 96, sub-section (4) (a) (ii) of the District Municipal Act (Bom. Act III of 1901), the plaintiff was entitled to the liberty of proceeding allowed by sub-section (4). After the expiry of one month, the order as to the balconies was spent and the plaintiff became entitled to proceed with the proposed work.

Per Curiam.—Under the District Municipal Act (Bom. Act III of 1901) an applicant is not to be restrained from proceeding with his work merely because a provisional order, which is expressly limited to one month, may have been issued months, or even years, earlier.

An order directing indefinite delay is inconsistent with the District Municipal Act (Bom. Act III of 1901).

SECOND appeal against the decision of D. G. Medhekar, Additional First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of K. K. Sunavala, Additional Joint Subordinate Judge.

The plaintiff sued for an injunction that the defendant Municipality should not remove or cause to be removed the projecting balconies which the plaintiff had attached to his house and costs. The plaintiff alleged that he rebuilt his house after giving notice to the Municipality in 1903 and attached the projecting balconies to its south and east about 16 feet above the ground, that the construction of the balconies was not in any wise opposed to the Municipal Act or its by-laws, that he had obtained permission for the construction of his house which, he understood, included permission for building balconies, that if that had not been so, defendant's Inspector who was present at the building of the balconies would have

(5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub-section (1), or without furnishing the documents or affording the information above prescribed, or except as provided in sub-section (4), without awaiting, or in any manner contrary to, such legal orders of the Municipality as may be issued under this section, or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees; and the Municipality may

(a) direct that the building, alteration, or addition be stopped,

and

(b) by written notice require such building, alteration or addition to be altered or demolished, as they may deem necessary.

1911.

AHMEDABAD MUNICIPALITY v. RAMJI KUPER.

advised plaintiff to apply for a separate permission for the balconies and that the defendant was attempting to remove the balconies, hence the suit.

The defendant replied that not only had the plaintiff built the balconies without permission, but he had done so in opposition to the express injunction against building them, that the permission for the building of the house did not include that for the balconies, and the plaintiff could not understand it to be so because the permit given him expressly forbade him from erecting the balconies.

The Subordinate Judge found that the plaintiff's balconies were not legally constructed and that the Municipality was entitled to remove them. He, therefore, *dismissed the suit*.

On appeal by the plaintiff, the appellate Court reversed the decree and allowed the claim.

The defendant Municipality preferred a second appeal.

L. A. Shah for the appellant (defendant Municipality).

T. R. Desai for the respondent (plaintiff).

BATCHELOR, J.:—On 3rd July 1903 the plaintiff, who is the respondent before us, applied to the defendant Municipality for permission to reconstruct his house, building balconies on the southern and eastern sides. On the 25th July 1903 the Municipality, by the written "permission note," Exhibit 33, gave the plaintiff permission to rebuild his house according to the plan submitted, but in the body of the note no reference was made to the question of the proposed balconies. This omission was, however, supplied by a postscript, which ran as follows:—"As regards the building of balconies, your application is placed before the Managing Committee for decision whether the permission should, or should not, be granted. Therefore until this permission is granted, you must not do any work in this respect." Then for a period of practically one year, *i. e.*, until the 15th July 1904, the Municipality did nothing, having, we are informed, lost or mislaid the papers. At some time during this protracted interval the plaintiff built his balconies as proposed. This was reported to the Munici-

pality on 15th July 1904, and on the 4th August following that body called upon the plaintiff to remove the balconies. After an unsuccessful petition to the Municipality praying them to reconsider their decision, the plaintiff brought this suit in which he seeks for an injunction against the Municipality restraining them from removing his balconies.

In the Court of first instance the suit was dismissed with costs, the Subordinate Judge's decision being based upon the broad ground that the structures had been erected although the Municipality's permission had been expressly withheld. It was inferred that the circumstances justified the application of those powers of demolition which are conferred on the Municipality by sub-section (5) of section 96 of the Bombay District Municipal Act, 1901.

The plaintiff appealed to the District Court, where the learned Subordinate Judge, A. P., made a decree in his favour, being of opinion that the Municipality's order of 25th July 1903 must be considered as a provisional order issued under sub-section (3) (*a*) of section 96, and, in consequence, not valid beyond a period of one month from the date of its issue.

Against this decree the present appeal is brought by the Municipality, and on their behalf it is contended that the order of 25th July 1903 should be referred to sub-section (2), and not to sub-section (3) (*a*) of section 96. We are, however, of opinion that the order is not one which could have been issued under sub-section (2). That sub-section provides for a variety of orders which may be passed by the Municipality; but the only words in the sub-section which, we think, could conceivably be invoked in aid of the particular order in question are those which empower the Municipality to issue "such orders not inconsistent with this Act as they think proper with reference to the work proposed." But in our opinion an order directing an indefinite delay—in this case a delay extending to one year—is inconsistent with the Act. That, we think, is made clear by sub-sections (3) and (5) which, in allowing the issue of a provisional order, strictly limit its duration to one month, and penalise only a person who begins to build without

1911.

AHMEDABAD MUNICIPALITY v. RAMJI KUBER.

awaiting the legal orders of the Municipality issued under section 96. Reading the section as a whole, we have no doubt that one of the objects of the Legislature was to discountenance just the kind of unreasonable dilatoriness which this case illustrates.

Then it was argued for the Municipality that the order of 25th July 1903, even if it does not fall within sub-section (2), certainly cannot be ascribed to sub-section (3) (*a*) because the provisional orders contemplated by this latter sub-section must be passed by the Municipality "before issuing any orders under sub-section (2)," whereas in this case we have but a single set of orders embodied in the "permission note" of 25th July. Even if this argument were sound, however, it would be no answer to the plaintiff, for the only result would be that the orders would be invalid as falling outside the provisions of the Act altogether. But it appears to us that the argument is not sound. We think the true view of these orders, and the view most favourable to the Municipality, is to regard them as consisting of two distinct and severable parts. The main body of the communication may rightly be referred to sub-section (2) inasmuch as it conveys permission to reconstruct the house according to the plan, subject to certain conditions. But the question of the balconies was treated by the Municipality as a separate matter, and their order in this respect must be referred to sub-section (3) (*a*) if it is to be regarded as possessing any legal validity at all under the Act. It is a temporary or provisional order directing that the intended work shall not be proceeded with until the Managing Committee have come to a decision; and the only authority discoverable in the Act for such an order is sub-section (3) (*a*), which provides for the issue of "a provisional order directing that for a period, which shall not be longer than one month from the date of such order, the intended work shall not be proceeded with."

No difficulty is created by the fact that a provisional order must precede the issue of any order under sub-section (2) because no order under sub-section (2) was issued in regard to

the balconies. It follows, therefore, that after the expiry of one month, this order as to the balconies was spent, and under sub-section (4) the plaintiff thereupon became entitled to proceed with the proposed work; for sub-section (4) enacts that an applicant shall be entitled to proceed with his intended work in case the Municipality, within one month from the receipt of the notice or application, have neither passed orders under sub-section (2) nor issued under sub-section (3) any provisional order. No orders under sub-section (2) were passed as to these balconies, and though, no doubt, a provisional order had been issued a year previously, we cannot think that that order had, under the section, any power to restrain the plaintiff from building For by the very nature of it as defined in sub-section (3) (*a*), its operation was limited to the period of one month, and sub-section (5), which deals with cases where an applicant is bound to await further orders, is careful to provide that such orders must be legal orders. We take it, therefore, that under the Act an applicant is not to be restrained from proceeding with his work merely because a provisional order, which is expressly limited to one month, may have been issued months, or even years, earlier. Thus, in order to avoid a plain contradiction, and to give effect to the section as a whole, we must read the words "any provisional order" in sub-section (4) (*a*) (ii) as referring only to a subsisting provisional order. There was no such order in this case, and therefore the plaintiff was entitled to the liberty of proceeding allowed by sub-section (4).

We affirm the decree of the Court below and dismiss this appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *August 10.*

DATTATRAYA VISHNU DHAMANKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU NARAYAN DHAMANKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partition—Decree for father's personal debt not illegal or immoral—Decree to be enforced by sale in execution of the entire family estate during father's life-time—Debt antecedent to the institution of the suit.

A son brought a suit against his father and the father's creditors for partition of his half share in certain ancestral properties and for a declaration that the incumbrances by way of mortgages created by his father were not binding on him and against his share. About the time the partition suit was filed, the father's creditors also filed suits to enforce their mortgages.

Held that a decree for a personal debt of the father not illegal or immoral might be enforced by sale in execution in his life time of the entire family estate.

Meenakshi Naidu v. *Immudi Kanaka*(1), followed.

FIRST appeal against the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana, in Original Suit No. 8 of 1904.

Suit for partition against father and his creditors and to recover free of incumbrances a moiety of ancestral immoveable property burdened by the father with mortgage debts.

One Vishnu Narayan Dhamankar was possessed of considerable immoveable property which was ancestral in his hands. He mortgaged some of it to his creditors known by the surname of Rode for Rs 12,000 under a registered mortgage-deed, dated the 14th November 1898. He had also borrowed from his creditor surnamed Risbud, on the security of his property, Rs. 5,000 and Rs. 4,712 under two registered mortgage-deeds, dated the 20th June 1889 and 21st June 1896, respectively.

On the 25th November 1903 the Rodes filed a suit, No. 231 of 1903, against Vishnu Narayan Dhamankar and his son Dattatraya for the recovery of Rs. 17,000, that is, Rs. 12,000

* First Appeal No. 125 of 1906.
(1) (1888) L. R. 16 I. A. 1.

principal and Rs. 5,000 interest, due under their mortgage of the 11th November 1898.

After the said suit was filed Vishnu's son Dattatraya, on the 6th January 1904, brought the present suit, No. 8 of 1904, against his father Vishnu Narayan Dhamankar as defendant 1, the Rode mortgagees as defendants 2—6, the Risbud mortgagee as defendant 7, and three coparceners as defendants 8—10, alleging that he, the plaintiff, was the only son of defendant 1, that the properties in suit were the ancestral properties of the family, that defendant 1 was addicted to vicious habits, that all the debts with which the properties were encumbered were squandered by him in profligacy and vice and no money was ever required or borrowed for the use of the family, that the plaintiff demanded his share in the properties from defendant 1, but he refused to make a division and that the mortgage debts contracted by defendant 1 were not binding on the plaintiff. He, therefore, prayed that his half share in the properties enumerated in the plaint be partitioned off and given over to him with a declaration that the encumbrances created by defendant 1 by way of mortgages to the Rodes, defendants 2—6, of one set and to Risbud, defendant 7, of the other, were not binding as against him and on his share in the properties.

Defendants 1 and 8—10 did not defend the suit though they were duly served with summonses.

The Rodes, defendants 2—6, denied that defendant 1 had spent the loans advanced by them for immoral purposes and answered *inter alia* that he borrowed money for paying antecedent debts and for satisfying decrees passed against him for the expenses of plaintiff's marriage and other ceremonies in the family, that plaintiff and defendant 1 were colluding to defeat their mortgage rights and that the suit having been instituted with notice and since the institution of their suit, No. 231 of 1903, was not maintainable.

Defendant 7, Risbud mortgagee, who had filed two suits, Nos. 212 and 214, on the 26th and 27th August 1904, respectively, raised substantially the same defences.

1911

DATTATRAYA VISHNU v. VISHNU NARAYAN.

The Subordinate Judge found that the plaintiff was entitled to the share claimed by him in the plaint, that the plaintiff did not prove that defendant 1 had, by contracting debts for immoral purposes, created charges on the properties in dispute and that they were, therefore, not binding on his share, that the suit was maintainable and that the plaintiff was entitled to a half share in the properties in suit subject to the mortgage encumbrances created by defendant 1 He, therefore, passed a decree in the following terms :—

The order therefore is that the plaintiff Dattatraya be declared entitled to one-half share in the properties described in the schedules A, B, C annexed to the plaint as forming the estate of the family of Vishnu Narayan Dhamankar; that he be allotted and be put in possession of his moiety by actual division by *metes and bounds* subject to the encumbrances created respectively in favour of defendants 2 to 6 of one set and defendant 7 of the other by their respective deeds of mortgage, exhibit 52 of Suit No. 231 of 1903, and exhibits 25 and 26 of Suit No 211 of 1901, on such of the plaint-properties as are mortgaged by each of them. The plaintiff must bear his own costs and those of the defendants 2 to 7 as one set except those otherwise ordered must come out of the plaint-properties. The other defendants must bear their own costs.

The plaintiff appealed.

Raikes with *K. N. Koyaji* for the appellant (plaintiff) :—The law stated by the Subordinate Judge under the authorities cited is correct. But we contend that this statement of the law and the authorities cited are not applicable to the present case. The authorities are to the effect that the son is not bound to pay the father's debts if some connection is shown between the father's debts and his immoralities. In the present case such connection is shown. (Evidence discussed.) Besides where an alienation or mortgage is not for an antecedent debt, but for a debt incurred at the time of the alienation or mortgage, the sons are not bound: *Chandradeo Singh* v. *Mata Prasad*(1), *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu*(2). Here the mortgages were effected to secure present advances and not antecedent debts.

M. M. Karbhari for respondent 1 (defendant 1).

(1) (1909) 31 All. 176. (2) (1905) 29 Mad. 200.

G. S. Rao with *P. B. Shingne* for respondents 2—6 (defendants 2—6):—The evidence fails to establish a connection between the father's debts and his immoralities. An antecedent debt is one which is antecedent to the institution of the suit: *Khalilul Rahman* v. *Gobind Pershad*[1], *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*[2].

D. A. Khare with *P. P. Khare* for respondent 7 (defendant 7).

SCOTT, C. J.:—The plaintiff in this suit prays for his half share in certain ancestral properties upon a partition and claims a declaration that incumbrances created by his father, the first defendant, by way of mortgage in favour of two sets of defendants, namely, the Rodes and Risbud, are not binding as against him and on his share in the properties.

The learned Subordinate Judge has held that the plaintiff is entitled to have his half share in the properties described in the plaint, partitioned and put into his possession but subject to the mortgages created by exhibit 42, a mortgage of the 11th of November 1898 for Rs. 12,000 in favour of the Rodes, and exhibits 25 and 36 being mortgages of the 20th of June 1889 and the 21st of June 1896 in favour of Risbud for Rs. 9,712.

The mortgagees in each case have filed suits to enforce their mortgages in consequence of the institution of this partition suit and by consent the evidence recorded in this suit is to be taken as evidence in the mortgage suits.

The plaintiff's case is put in this way: he says that the annual profits of the family properties amount to nearly Rs.3,000 on the average and that the family expenses only absorb about one half of that income, and that any sums borrowed by the first defendant upon mortgage cannot have been for family necessities but must have been for immoral purposes such as the support of prostitutes and the expenses of *natches* and other *tamashas*.

The learned Judge who has discussed the evidence with great care and thoroughness has come to the conclusion that

(1) (1892) 20 Cal. 328. (2) (1907) 34 Cal. 735.

1911.

DATTATRAYA VISHNU v. VISHNU NARAYAN.

certain sums were spent by the first defendant upon the support of a prostitute named Jivi and her household and on jewellery and clothes for her and in the expenses of *tamashas* and other revelry, but he is unable to arrive at any conclusion as to the amounts which were borrowed from the different creditors for these purposes. The amounts due upon the mortgages of the Rodes and Risbuds above referred to amount to upwards of Rs. 20,000 but there is no evidence to show that anything like that sum was spent upon such immoral purposes as have been described.

One witness Ramchandra Vishnu Bhagwat goes so far as to say that Rs. 6,000 was borrowed from Rode and a similar sum from Risbud and handed over to Jivi But the learned Judge does not believe his evidence, and we think there is good ground for the strictures which he passed upon it. Another witness Vishvanath Gokhale says that money was borrowed from Rode in small sums from time to time for Jivi, and the money was expended in the purchase of clothes from one or other of the mortgagees. The learned Judge however characterizes his evidence as palpably false and we are not prepared to dissent from this estimate.

The conclusion arrived at by the lower Court is that Jivi the prostitute was in the keeping of Vishnu for 17 or 18 years, that her sister Baji was also a prostitute and lived with her for about 6 or 7 years, and that during the whole period of intimacy between Vishnu and Jivi he maintained her household at an expenditure which cannot have been less than Rs. 400 a year, that it is also established that Vishnu was fond of *tamashas* and indulged in them at Jivi's house at his own expense. As is pointed out by Counsel for the appellant an expenditure of Rs. 400 a year for 17 years with simple interest at six per cent. would amount to half the sum due upon the mortgages. The difficulty, however, which lies in his way is that we have two sets of mortgagees and that it is impossible upon the evidence to ascertain whose advances were applied for the benefit of Jivi and the *tamashas*. There is no documentary evidence to show that any sums were consciously

advanced by either of the mortgagees for immoral purposes and there is evidence that a considerable amount of money amounting in the judgment of the Subordinate Judge to not less than Rs. 12,000 was borrowed for family ceremonies. It is also proved that the first defendant was a man in a leading position in the small town in which he lived who was obliged to indulge in the certain amount of hospitality. The plaintiff and his father have greatly added to the difficulty of ascertaining the objects of the various loans taken from the Rodes and Risbuds by suppressing the account-books relating to the family affairs which it is conclusively established were in existence prior to the date of the suit If all this money had been borrowed from one money-lender upon mortgage it might be possible to give some relief to the plaintiff. But in the circumstances of this case we do not think that he has been able to establish more than was established in other reported cases in which it has been proved to the satisfaction of the Court that the father who has executed the mortgages was addicted to immorality and extravagance, without any evidence being forthcoming of connection between the particular loan and the immoral expenditure. As examples we may refer to the cases of *Chintamanrav Mehendale* v. *Kashinath*[1] and *Bhagbut Pershad* v. *Mussumat Girja Koer*[2].

It has however been argued on behalf of the plaintiff that where property is transferred by way of mortgage to secure a present advance it is not an alienation for an antecedent debt and that therefore the creditor cannot claim that the interest of the son shall be applied to satisfy the debt of the father unless that debt is shown to have been incurred for family necessities.

In our opinion, however, this question was finally decided so far as this Court is concerned in the case of *Chintamanrav Mahendale* v. *Kashinath*[1] already referred to. In that case the plaintiff brought a suit against the son of the deceased mortgagor to recover the balance of a debt due on a mortgage-bond by sale or foreclosure. The defendant pleaded that the loan was

(1) (1889) 14 Bom. 320.

(2) 1888) L. R. 15 I. A. 99.

1911.

DATTATRAYA VISHNU v. VISHNU NARAYAN.

contracted without his knowledge and for immoral purposes and that his share in the mortgaged property could not be held answerable for the debt. The Subordinate Judge awarded the plaintiff's claim and directed that the mortgaged property be sold. The decree was confirmed in appeal to the High Court. Sir Charles Sargent in delivering the judgment said (p. 324)—"In *Luchmun Dass* v. *Giridhur Chowdhry*[1] the effects of the decisions in *Kantoo Lall's* case[2] and *Suraj Bunsi* v. *Sheo Proshad*[3] were considered by a Full Bench of the Calcutta High Court, and the Court held that the loan for which the bond was passed by the father, as stated by the reference, was an antecedent debt within the contemplation of the propositions set out in *Suraj Bunsi's* case, and that (as shown by the first question referred) although 'on the one hand it was not proved that there was any necessity for raising the money, nor on the other that the money was raised or expended for immoral or illegal purposes', the mortgagee was at any rate entitled to a decree directing the debt to be raised out of the whole ancestral property, including the mortgaged property." He then referred to the well known passage in *Mussamut Nanomi Babuasin* v. *Modun Mohun*[4] "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality."

Sir Charles Sargent then said that the Court agreed with the statement of the Court in *Jagabhai* v. *Vijbhukandas*[5] that the effect of the Privy Council decision in *Nanomi Babuasin's* case[4] was "that the father's disposition of the family estate, or a disposal of it under proceedings taken against the father alone, is made to affect the son's as well as the father's interest, except so far as the son can establish, in a proceeding taken for that puropose, that the voluntary disposal was made under circumstances which deprived the father of

(1) (1880) 5 Cal. 855.
(2) (1874) L. R. 1 I. A. 321.
(3) (1879) L. R. 6 I. A. 88.
(4) (1885) L. R. 13 I. A. 1 at p 18.
(5) (1886) 11 Bom. 37 at p. 41.

the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject."

The passage in *Nanomi Babuasin's* case[1] above referred to does not in terms lay down a rule for cases in which the joint ancestral property has become the subject of a claim under a mortgage by the father. It is regarded by the Privy Council in *Bhagbut Pershad* v. *Mussumat Girja Koer*[2] as adopting the principle laid down in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[3] where the Court deduced from *Girdharee Lall* v. *Kantoo Lall*[4] the proposition that when joint ancestral property has passed out of the family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt his sons by reason of their duty to pay their father's debt cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted.

It is pointed out in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*[5] that the cases of *Mussamut Nanomi Babuasin* v. *Modun Mohun*[1] and *Bhagbut Pershad* v. *Mussumat Girja Koer*[2] do not lay down any rule inconsistent with or materially different in principle from earlier decisions of the Judicial Committee which were cited in argument before the Full Bench in *Luchmun Dass* v. *Giridhur Chowdhry*[6] and that the decision of the Full Bench has been uniformly treated as binding in Calcutta in spite of the later Privy Council cases. In Bombay the relief awarded to the plaintiff mortgagee has not been confined as in Calcutta to a mortgage decree against the father and a simple money-decree against the sons for the balance unsatisfied on the sale under the mortgage decree. As observed in *Khalilul Rahman* v. *Gobind Pershad*[7], the result of the Full Bench case seems to be that "debt" in the case of a proceeding by suit means "debt antecedent to the institution of the suit" if it is necessary to have recourse to the

(1) (1885) L. R. 13 I. A. 1 at p. 18.
(2) (1888) L. R. 15 I. A. 99.
(3) (1879) L. R. 6 I. A. 88 at p. 104.
(4) (1874) L. R. 1 I. A. 321.
(5) (1907) 34 Cal. 735.
(6) (1880) 5 Cal. 855.
(7) (1892) 20 Cal. 328.

1911.

DATTATRAYA VISHNU v. VISHNU NARAYAN.

canon in *Suraj Bunsi's* case[1]. It is now established that a decree for a personal debt of the father not illegal or immoral may be enforced by sale in execution in his life-time of the entire family estate: *Meenakshi Naidu* v. *Immudi Kanaka*[2].

The only difference between this and the Calcutta Court is one of practice. Shall the mortgaged estate be sold as a whole in order that the proceeds may be applied in satisfaction of the debt or shall it be sold piece-meal, first the interest of the father and then if the proceeds are insufficient the interest of the sons? The advantage of the parties would in most cases we think be best attained by a single sale. There may however be cases in which the Calcutta practice would be the best.

We confirm the decree of the lower Court and dismiss the appeal with costs.

In appeals Nos. 126, 156 and 127 of 1906 Mr. Coyaji on behalf of his client Dattatraya Vishnu Dhamankar undertaking that if on his father's interest in the family properties being put up for sale the bids do not reach an amount sufficient to satisfy the claims of the mortgagees, he will agree that the interest of his client, as well as that of his father, shall be put up for sale, we order that in the first instance the mortgagees are entitled to an order for sale of the interest of the mortgagor in the family properties, in default of the satisfaction of the decree within three months. The mortgagees are entitled to interest at the rate of six per cent. per annum on the mortgage up to the date of realization. With the above modification we confirm the decree of the lower Court.

The mortgagees are entitled to add their costs of the appeals to the mortgage-debt.

In appeal No. 128 of 1906 we modify the decree of the lower Court by awarding to the plaintiff interest at the rate of six per cent. per annum on Rs. 4,508-9-9 out of the amount decreed up to the date of realization and otherwise confirm the decree. Respondents 1 to 4 to get their costs of the appeal.

Decree confirmed.

G. B. R.

(1) (1879) L. R. 6 I. A. 88 at p. 104. (2) (1888) L. R. 16 I. A. 1.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

FATMABAI, PLAINTIFF, v. SONBAI AND OTHERS, DEFENDANTS.* 1911. *January 21.*

Practice—Procedure—Rule to set aside consent decree.

A consent decree once duly obtained cannot be set aside by a rule, but if it is sought to impeach it upon grounds of fraud, that must be done in a regular suit. The only alternative which the law allows is an application for review of judgment.

THE plaintiff Fatmabai brought a suit against the defendants praying *inter alia* for discovery of the property of her deceased husband and of her Stridhan ornaments and clothes given into the hands of the defendants, for maintenance and for a receiver to take charge of the books of account and papers of her deceased husband.

By a consent decree dated the 26th August 1900 the said suit was settled on certain terms. Thereafter the third defendant Kulsambai obtained a rule calling upon the plaintiff and the first and second defendants to show cause why the said consent decree should not be set aside and the suit restored to the board for rehearing The third defendant alleged *inter alia* that the warrant authorising her attorney to defend the suit on her behalf was forged.

Setalvad for defendant No. 3 in support of the rule.

Wadia for defendant No. 2 showed cause.

BEAMAN, J. :—At the end of last term Mr. Lowndes appeared for defendant No. 3 and asked for a rule calling upon all the other parties to the consent decree to show cause why that decree should not be set aside on grounds of forgery and fraud alleged particularly against the second defendant. I then intimated to Mr. Lowndes that I did not think any rule of that kind even if granted could be productive of any useful result or even could be made absolute, as in my opinion he had chosen the wrong procedure Mr. Lowndes, while admitting that he entertained some doubt upon the point, pressed for the rule in order that it might be argued when due return had been made to it.

* Original Suit No. 952 of 1909.

1911.

FATMABAI v. SONBAI.

It has come before me today and has been well argued on both sides, Mr. Setalvad representing Mr. Lowndes; but I remain of the same opinion. Nothing that has been said in the course of the argument for defendant No. 3 has in the slightest degree shaken the opinion, which I was disposed to hold from the first, that a consent decree once duly obtained cannot be set aside by any rule of this kind, but if it is sought to impeach it upon grounds of fraud, that must be done in a regular suit. The only alternative which our law allows is an application for review of judgment, but such an application in the present suit would clearly be time-barred.

In the course of the argument, I have been referred to various authorities; but the principle appears to me to be so plain as hardly to stand in need of authority. True, there may conceivably be cases—extreme cases—as indicated by Lord Cottenham in *Morison* v. *Morison*[1], where the impeached decree is so defective that the Court treats it as a nullity, then possibly it may be got rid of by motion. But where upon the face of it there is nothing defective or irregular in the decree but a party thereto seeks to have it set aside alleging that it was obtained by fraud, then the Legislature provides a special and formal remedy I cannot see any distinction between the English and the Indian law in this respect; and the procedure to be followed in England was well and clearly laid down by Jessel M R in *Flower* v. *Lloyd*[2]. That case might be distinguished from the case before me in respect of the ultimate ground of the decision; but Jessel M. R.'s exposition of the principle appears to me to be applicable in the present case. He insists that where there is a remedy, and a regular remedy, provided by the Legislature for a party considering himself to be aggrieved on account of fraud, that remedy ought to be availed of, and to use his language the decree must be got rid of by an original bill, which is the same thing as saying in our Courts that a party, situated as defendant No. 3 is situated now, must have recourse to a regular suit. So it was held in our own Court in *Karmali Rahimbhoy* v. *Rahim-*

(1) (1838) 4 M. & C. 215.

(2) (1877) 6 Ch. D. 297.

bhoy Habibbhoy[1], confirmed in appeal in *Mirali Rahimbhoy* v. *Rehmoobhoy Habibbhoy*[2]; and the latest decision to which I have been referred, *Ainsworth* v. *Wilding*[3], is a clear and conclusive authority in support of the view I have expressed throughout. There is also good reason why questions of this kind should not be opened by motions in which the Court ordinarily has to rest its decision upon affidavits. Very serious allegations are made against defendant No. 2. Certainly no Court would care to decide questions of forgery and fraud upon affidavits. So that the law evidently contemplating the materials available to the Courts when different lines of procedure are followed has advisedly restricted inquiries, of which the content is so grave and the consequences so serious, to the form of a regular suit

When I mentioned this as an additional reason only upon the ground of general expediency for refusing to go further with a rule of this kind, Mr. Setalvad, admitting the force of the consideration, suggested that the difficulty might be overcome by calling for oral proof upon this rule. That would make the rule assume for all practical purposes the form and dimensions of a regular suit, though it might be less costly.

It is not, however, merely upon this broad general ground of discretion as to what relief a Court will be disposed to give in particular matters that I rest my decision. I am very sure that the Court has really no jurisdiction to entertain a rule of this kind. The decree of the Court was duly sealed some months ago and that put an end to the litigation so far as this Court was concerned, unless it were properly re-opened within the period prescribed by the Limitation Act for presenting an application for review That, however, has not been done, and the only way, by which the law now leaves it open to defendant No. 3 to obtain the relief he apparently hoped to obtain by this rule, is to bring a regular suit praying to have the decree set aside for fraud. It is not as though he were deprived of all relief, for then, as Jessel M. R. said in *Flower* v. *Lloyd*[4], I too should be slow to believe that the Court had no

(1) (1888) 13 Bom. 137.
(2) (1891) 15 Bom. 591.
(3) [1896] 1 Ch. 673.
(4) (1877) 6 Ch. D. 297.

1911.

FATMABAI v. SONBAI.

power to correct a miscarriage had there indeed been one. But there is a right and a wrong way of obtaining that relief, and I have no doubt that defendant No. 3 by pressing on this rule has chosen the wrong way.

I may further add that whether the allegations which defendant No. 3 makes against defendant No. 2 be true or false, there do not appear to be any substantial merits in the defendant No. 3's grievance so far as the result of the former litigation is alone considered. Defendant No. 2 indeed is so indifferent that he was very near consenting that the consent decree should be set aside, and whatever rights defendant No 3 may possess apart from that decree against defendant No. 2 are apparently already being litigated, while defendant No. 2 has not set up this consent decree as any bar to that litigation. I cannot help thinking it a pity that this rule has been brought on and a considerable amount of time taken up in arguing it. But after hearing the correspondence which passed between the solicitors of defendant No. 3 and defendant No. 2 read, I do not much wonder that matters were not arranged I do not know who the attorneys were, but I cannot refrain from remarking that the tone of defendant No. 2's letters contrasts very favourably indeed with that of those addressed to him by the attorneys of defendant No 3. The latter are couched in provocative and offensive language, which I cannot help thinking is often used with a deliberate intention of goading the addressee into further litigation; and whenever I hear a correspondence of that kind read from whatever firm it emanates, I shall always express my strong reprobation of it

This rule will now be dismissed with all costs.

Attorneys for plaintiff: Messrs. *Khanderao, Laud* and *Mehta.*

Attorneys for defendant No. 1: Mr. *S. B. Mehta.*

Attorneys for defendant No. 2: Messrs. *Khanderao, Laud* and *Mehta.*

Attorneys for defendant No. 3: Messrs. *Edgelow, Gulabchand* and *Wadia.*

Rule dismissed

B. N. L.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaward.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MATHURADAS GOKALDAS PASTA.* 1911. *July* 10.

City of Bombay Municipal Act (Bom. Act III of 1888), sections 379, 379A†—Overcrowding of house—Notice to abate the nuisance—Service of notice—Owner—Rooms in a building let to different tenants—Overcrowding by tenants—Notice to the owner.

The notice contemplated by section 379A of the City of Bombay Municipal Act (Bom. Act III of 1888) should be given to the owner of a building in cases where the owner has let rooms in the building to separate tenants who cause overcrowding.

THIS was a reference made by P. H. Dastur, Second Presidency Magistrate of Bombay.

* Criminal Reference No. 28 of 1911.

† The sections run as follows:—

379. (1) The owner of a building shall, within a period of seven days after receipt of a written notice from the Commissioner, sign and give a certificate of the following particulars with respect to such building or any part thereof:—

(a) the total numbers of rooms in the building,

(b) the length, breadth and height of each room, and

(c) the name of the person to whom he has let the building or each part of the building occupied as a separate tenement.

(2) The occupier of a building or of any part of a building occupied as a separate tenement shall, on like notice and within the like period, sign and give a certificate of the following particulars with respect to such building or part of such building as aforesaid which is in his occupation:—

(a) the total number of persons dwelling in the building or any part of it,

(b) the manner of use of each room by day and by night, and

(c) the number, sex and age of the occupants of each room used for sleeping.

379A. (1) Where it appears to the Commissioner, whether from any certificate furnished under section 379 or otherwise, that any building or any room or rooms therein used for human habitation is overcrowded, he may apply to a Presidency Magistrate to prevent such overcrowding, and the said Magistrate, after such inquiry as he thinks fit to make, may prescribe the maximum number of persons to be accommodated in each room and may, by written order, require the owner of the building, within a reasonable time not exceeding ten days to be prescribed in the said order, to abate the overcrowding thereof, by reducing the number of lodgers, tenants or other inmates of the said building or room or rooms, in accordance with the maximum so prescribed and to the satisfaction of the Commissioner, or may pass such other order as he may deem just and proper.

1911.

Municipal Commissioner for the City of Bombay v. Mathuradas.

Mathuradas was the owner of a building which was situated on the Matarpakhady Road in the city of Bombay The building had two storeys, on each of which there were 12 rooms. These rooms were let by the owner singly to different tenants. The rooms on the ground floor had an air space of 832 cubic feet, while those on the upper floor had 798 cubic feet of air space. The total number of persons living in the whole building was 123.

The Municipal Commissioner of the City of Bombay applied to the Second Presidency Magistrate of Bombay under section 397A (1) of the City of Bombay Municipal Act (Bom. Act III of 1888), for an order to fix the maximum number of persons to be accommodated in each room and a written notice requiring the owner of the building to abate the overcrowding. The Magistrate held the inquiry and decided that the maximum number in each room should be three adults and one child. A question then arose as to who should be served with the notice of abatement. It was urged by the Municipality that the notice should be issued to the owner Mathuradas. It was urged on Mathuradas' behalf that the notices should be served on the

(2) Where the owner of the said building has sub-let the same, the landlord of the lodgers, tenants or other actual inmates of the same shall, for the purposes of this section, be deemed to be the owner of the said building.

(3) Every tenant, lodger or other inmate of the same building shall vacate on being required by the owner so to do in pursuance of any order under sub-section (1).

(4) A room used exclusively as a dwelling shall be deemed to be overcrowded within the meaning of this section when the number of adult inmates is such that the amount of floor space available for each adult inmate is less than twenty-five superficial feet, and for each person under the age of ten years less than twelve and one-half superficial feet, or when the air space for each adult inmate is less than two hundred and fifty cubic feet, two children under ten years of age counting as one adult.

(5) A room not exclusively used as a dwelling shall be deemed to be overcrowded within the meaning of this section when the number of adult inmates is such that the amount of floor space available for each adult inmate is less than thirty superficial feet, and for each person under the age of ten years less than fifteen superficial feet, or when the air space for each adult inmate is less than three hundred cubic feet, two children under ten years of age counting as one adult.

tenants personally who were responsible for the overcrowding. The Magistrate was of opinion that the notices should go to the tenants and not to the owner, on the following grounds :—

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MATHURADAS.

"It seems clear, looking to clause (2) of the section, that when the owner has sub-let the building, as is the case here, the tenants should be given the notice, but Mr. Crawford contends that the words used are "sub let the same," which refer to the whole building and not bits of the building; and as the owner in the present case has not sub-let the whole building to one individual, this clause, he contends, does not apply to the present case. I hold, however, that "sub-let the same" does also refer to the sub-letting of bits of the building and think that notice in this case should be issued to the tenants of Mathuradas and not to him."

Mr. Crawford, for the Municipal Commissioner of the City of Bombay, requested the Magistrate to refer the point to the High Court for opinion : the Magistrate, thereupon, referred the following question to the High Court :—

When the owner of a building has let his rooms separately to individual tenants and these cause the overcrowding, is the notice, to abate the same, to be given, under section 379A (1) of the Bombay Municipal Act, to the owner or to the tenants?

The reference was heard.

Lang, instructed by *Crawford, Brown & Co*, for the Municipality—The notice under section 379A (1) of the Bombay City Municipal Act should be issued to the owner of the building. Clause (2) of the section is intended to provide for the very common case where the owner of the building sub-lets or farms the whole building to a contractor and has no dominion over the building at all. The order of the Magistrate requires 24 different notices to issue That this was not the intention of the framers of the Act is clear from the wording of section 379A, clause (1). In section 379A, clause (1), no matter whether one room is overcrowded or every room, it is the "owner of the building," obviously as a whole, who is made responsible, *i. e.*, it does not contemplate a number of notices but only one. Clause (2) carries this idea on only making provision for a special case Why should clause (2) suddenly change and contemplate a number of notices. Besides this there are practical disadvantages. Suppose a chawl of 100 rooms, the Magistrate would have to issue 100 notices and bring to Court 100 persons, mostly of the mill-hand class.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MATHURADAS

Jardine, instructed by *Little & Co.*, for Mathuradas.—The intention of section 379A is to reach the person in actual possession of the room or house overcrowded. The preceding section, that is, section 379, distinguishes between the owner and the occupier and apportions certain duties to each. This distinction would be meaningless and unnecessary, if it is not read into section 379A. This construction derives support from the fact that the Legislature has used in clause (2) of the section, the term "lodger" and not "lessees." The section contemplates a house divided into separate tenements, each one of which is rented by a different person who individually is liable to abate the overcrowding.

Lang in reply —Section 379 provides for obtaining different items of information either from the "owner" or the "occupier," as one best fitted to give it It does not divide the responsibility in any way There is no hardship on the owner. All he has to do is to call on his tenants to vacate and if they do not they can be punished under section 471 of the Act.

CHANDAVARKAR, J.—This is a reference under section 432 of the Code of Criminal Procedure by the Second Presidency Magistrate of Bombay.

The question of law referred arises upon the construction of clauses (1) and (2) of section 379A of the Bombay Municipal Act (III of 1888) as amended by Bombay Act V of 1905, and is as follows:—

"When the owner of a building has let his rooms separately to individual tenants, and these cause overcrowding, is the notice, to abate the same, to be given, under section 379A (1) of the Bombay Municipal Act, III of 1888, to the owner or to the tenants?"

Our answer is, the notice must be to the owner.

To construe properly clause (2) of section 379A, we must bear in mind what has gone before in clause (1) of the section.

The latter clause provides (omitting portions which are not material here) that "where it appears to the Commissioner that any building or any room or rooms therein used for human habitation is overcrowded," he may apply to a Presidency Magistrate "to prevent such overcrowding," and that the Magistrate "may, by written order, require the owner of

the building" to adopt measures (pointed out in the clause) to abate the overcrowding.

It is obvious from the language of this clause that, whether the overcrowding is in the whole of the building or in only one room or some rooms of it, the written order must be to "the owner of the building". It is the whole building as one undivided entity and its owner as a single person that are brought within the operation of the clause.

Then comes clause (2). It deals with the case of a building sub-let. It runs as follows —"Where the owner of the said building has sub-let the same, the landlord of the lodgers, tenants, or other actual inmates of the same shall, for the purposes of this section, be deemed to be the owner of the said building." Here the words are "the said building" The words "any room or rooms therein" in clause (1) are studiously excluded: *Expressio unius est exclusio alterius* What is contemplated is the whole building taken as a single undivided entity, not one split into parts and sub-let in portions.

The word "owner", as defined in clause (*m*) of section 3 of the Act, means, when read in reference to any premises, "the person who receives the rent of the said premises, or who would be entitled to receive the rent thereof, if the premises were let". This definition is wide enough to include the case of a building, which, having been let to a tenant with power to sub-let, is sub-let by the tenant, as well as the case of a building simply let. In the former case, the tenant who has sub-let becomes "the owner" and "the landlord of the lodgers, tenants, or other actual inmates" of the building. He represents them for the purposes of the section, because, according to the law of landlord and tenant, there is no privity of contract or estate between a lessor and a sub-lessee, unless there is an agreement creating such privity. The clause we are construing recognises no such agreement for its purposes but keeps to the general law.

It follows, therefore, that when a building is sub-let, the lessee who sub-lets is "the owner of the building" within the meaning of the section.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MATHURADAS

But what if the proprietor of a building consisting of several rooms lets it in parts to several tenants with power to sub-let, and each or some of these sub-let? Are these tenants who have sub-let "owners of the building" within the meaning of section 379A?

They are not. The section contemplates a person who is "*owner of the building*", *that is to say, of the whole building*, which tenants of portions who have sub-let are not. That is because each of them is a tenant receiving rent from his sub-tenant in respect of the room or rooms he has sub-let. His right does not cover the whole building, whereas it is the ownership of the building as one whole that is meant by the Legislature for the purposes of the section. In that case the only person "who receives the rent of" the *building* is its proprietor, who has let it to the tenants with power to sub-let. He is, therefore, the only person falling within the definition of "owner" and becomes liable under clause (1) of section 379A.

In the present case it seems to have been urged before the Magistrate for the person proceeded against as "owner", that he did not come within the section, because the building, to which the complaint of overcrowding related, and which consisted of 24 rooms, had been "sub-let" by him to 24 tenants. This is rather a vague defence "Sub-letting" is by a person who holds the property as a lessee with power to sub-let and becomes landlord in his turn There is nothing on the record to show that the person here proceeded against is of that description, unless we are to take what was said *in argument before the* Magistrate by the respective solicitors of the parties as amounting to that. But that is not so clear. In any case, if the said person is himself lessee of the building and has "sub-let" to 24 tenants, he is "the owner" who has sub-let the building and who is "the landlord" of the tenants within the meaning of clause (2) of section 379A. If, being such a lessee, he has sub-let to 24 tenants with power to sub-let on their part and each or some of these has or have "sub-let", in the exercise of that power, it is he who still remains "owner of the said building", because,

as pointed out above, of no tenant who has sub-let can it be said that he receives the rent of "the said building" understanding the word as one undivided whole, without any reference to any individual room or rooms, on the true construction of clause (2) read by the light of clause (1) of section 379A. Who, then, is the person receiving rent in respect of the whole building, and, therefore, "owner", as defined in clause (m) of section 3 but the lessee who has sub-let? For the same reason, if the person proceeded against is the proprietor of the building and has let each room to a tenant with power to sub-let, and the tenants, all or some, have sub-let, the same result follows and he is liable as "owner"

His counsel has before us laid stress on what he calls the hardship that must result from such a construction of the section. Whether hardship or no hardship, we must adopt that meaning of the statute which is in accordance with settled canons of construction and which does no violence to its language. "No doubt, great power is given to sanitary authorities, the Legislature thinking that it was tolerably certain that they would use those powers with discretion, and not tyrannically. We must, therefore, construe those sections and bye-laws without regard to consequences". per Bramwell, L. J., in *Baker* v. *Mayor, etc, of Portsmouth*[1]. And, after all, what is the hardship here? The owner is to be required to abate the nuisance of overcrowding. He has to pass the order on to his tenants and call upon them to vacate, if required by that order. That is no hardship to him, if any, it is on the tenants. But the continuance of danger to the public health and sanitation of the city arising from overcrowding is a much greater hardship.

With this answer to the learned Magistrate's reference, the record and proceedings must be returned to him for disposal of the case accordingly. Costs of this reference on the respondent, Mr. Mathuradas Gokaldas.

Answer accordingly.

R. R.

(1) (1878) 3 Ex. D. 157.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911. *July* 18

GANPAT VALAD DHAKU TELI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* TULSIRAM UKHA DHANGAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Widow—Alienation—Legal necessity—Performance of pilgrimage—Betrothal of daughter.

Under Hindu law, the expenses incurred by a Hindu widow in performing pilgrimage or in the betrothal of her daughter constitute legal necessity.

As regards pilgrimage, the question in every case must be whether it was for the spiritual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable or were made honestly, having regard to the estate, the status of the family, and other considerations which it is customary for Hindus to take into account in accordance with their religious beliefs and usages.

APPEAL from the decree passed by H. S. Phadnis, District Judge of Khandesh, amending the decree passed by M. N. Choksi, Joint Subordinate Judge at Dhulia.

Suit for declaration.

Three brothers Ganpat, Tanaji (plaintiffs) and Vithu lived together. They separated in 1897. Vithu lived with his wife Umi (defendant No. 1) and had a daughter by her. He died in 1902. After his death, Umi contracted certain debts for performing the betrothal expenses of her daughter and making a pilgrimage. To pay off these debts she sold the property which she inherited from her husband to Tukaram (defendant No. 2) for Rs. 700. The daughter died some time before the sale. A month after the sale Umi contracted a remarriage. The plaintiffs, the brothers of Vithu, filed this suit to recover possession of the property, alleging that Umi's alienation did not bind them. The defendants contended *inter alia* that the sale was effected for a necessary purpose and binding on the plaintiffs. The Court of first instance decided against the defendant's contention and decreed the plaintiff's claim. On appeal the District Judge held that out of the consideration for the sale deed, Rs. 145 represented old debts,

* Second Appeal No. 618 of 1909.

l'he learned Judge therefore held the sale was justi-
xtent of Rs. 412; and that the plaintiffs could
ssion of the property from defendent No. 2 by pay-
to him.

tiff appealed.

: for the appellant.

'vardhan for the respondent.

ving cases were referred to :—*Huro Mohun Audhi-
ↄmutty*[1] and *Rama* v. *Ranga*[2].

ARKAR, J —The sale impeached in this case was
widow of property which she had inherited from
d. It was effected partly for the purpose of paying
ebts, which the widow had incurred in the interests
rty, and partly for the expenses of a pilgrimage
ndharpur and of her daughter's betrothal ceremony.
n is raised to the sale, so far as its consideration
in the payment of debts is concerned. What is
hat the expenses of the pilgrimage and of the
e not within the definition of legal necessity required
law to render a sale by a widow valid and binding
versioners.

he pilgrimage, we must bear in mind the posi-
Hindu widow with reference to the estate she
om her husband and the duties she owes to his
bserved by the Judicial Committee of the Privy
The Collector of Masulipatam v. *Cavaly Vencata
ah*[3], a Hindu widow has to lead the life of ascetic
nd hence the law gives her a power of disposition
s purposes, which is denied to her for other purposes.
say, "for religious or charitable purposes, or those
supposed to conduce to the spiritual welfare of her
e has a larger power of disposition than that which

[1] (1864) 1 W. R. 252 (Civ. Rul.). [2] (1885) 8 Mad. 552.
[3] (1861) 8 Moo. I. A. 529 at p. 551.

1911.

GANPAT VALAD DHAKU v. TULSIRAM.

she possesses for purely worldly purposes?' Accordingly, in that case, the expenses of a pilgrimage to Gya for the performance of the husband's *shraddha* there were allowed as fulfilling the conditions of legal necessity.

Vijnaneshwara points out in the Mitakshara that "the succession of a chaste widow" to her husband as heir "is expressly declared" by the text: "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share." (The Mit., Ch II, Sec. I., pl. 18.) Pilgrimages are generally made by a widow with a view to present her husband's funeral oblations at the sacred place visited and to ensure for his soul the special merit arising from such presentation In every case the question must be whether the pilgrimage was for the spiritual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable and were made honestly, having regard to the estate, the *status* of the family, and other considerations which it is customary for Hindus to take into account in accordance with their religious beliefs and usages. "A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, as Mr. Justice West says in *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*[1], she acts fairly to her expectant heirs": *Venkaji Shridhar* v. *Vishnu Babaji Beri*[2].

In the present case, the pilgrimage was to Pandharpur, and the expenses incurred were Rs. 100, of which the District Judge has allowed Rs. 50 only as having been reasonably necessary. That is a question of fact, binding on us in second appeal.

As to the betrothal, it was, as found by the Court below, in accordance with a custom of the caste to which the parties belong, and the widow was well within her power in incurring the charges.

The decree is confirmed with costs.

Decree confirmed.

R. R.

(1) (1886) 11 Bom. 320.

(2) (1893) 18 Bom. 534 at p. 536.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaward.

DHARMA BAL PATIL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BALAMIYA VALAD HAJIMIYA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1911. *August 1*

Bombay Land Revenue Code (Bombay Act V of 1879), sections 56, 214, Rules 32, 62, 63†—Occupancy—Non-payment of assessment—Forfeiture of occupancy—Re-grant to fresh occupants—Restoration of holding to original occupant—Collector, powers of

Owing to non-payment of assessment to Government, an occupancy was forfeited under section 56 of the Bombay Land Revenue Code (Bombay Act V of 1879) and

* S. A No. 522 of 1909.

†56 Arrears of land revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214, and such occupancy or alienated holding when disposed of, whether by sale as aforesaid, or by restoration to the defaulter, or by transfer to another person or otherwise howsoever, shall, unless the Collector otherwise directs, be deemed to be freed from all tenures, rights, incumbrances and equities theretofore created in favour of any person other than Government in respect of such occupancy or holding.

Land revenue a paramount charge on land.

Rule 32.—In every case in which a lease is not executed under the last preceding rule, an agreement, in the form of Appendix D, shall be taken from the person who is to become the registered occupant, and every such agreement shall be endorsed by two respectable witnesses and by the patel and village-accountant of the village in which the land to which it relates is situate, to the effect prescribed below the said form; and the Mamlatdar or Mahalkari who takes the said agreement will be held responsible for exercising due care in ascertaining the identity of the persons signing the same, and their fitness to be accepted as occupants responsible for the payment of land revenue, notwithstanding that the agreements have been duly endorsed as hereinbefore required:

Provided always that no such agreement shall be necessary when an agreement, in the form of Appendix C, is taken under Rule 27.

Rule 62.—If, for any reason, a forfeited occupancy is not sold, the Collector shall either cause the land comprised therein to be entered in the records as

1911.

DHARMA BAL PATIL v. BALAMIYA.

was thereafter disposed of by the Collector, under Rules 32 and 62 framed under section 214 of the Code, to the defendants who signed *kabulayats*. Some years after this, the Collector ordered the same occupancy to be taken from the defendants and given to the plaintiffs who had been occupants before the forfeiture. The defendants having declined to deliver up possession were sued by the plaintiffs:

Held, that the Collector was not empowered by the rules framed under section 214 of the Code to pass the order he did, and that the plaintiffs were, therefore, not entitled to succeed.

Rule 68 of the rules framed under section 214 of the Bombay Land Revenue Code, 1879, empowers a Collector to restore a forfeited occupancy to the original occupant. But when a forfeited occupancy has been disposed of by grant to a new occupant, it ceases to be a forfeited occupancy and the rule has no longer any application.

SECOND appeal from the decision of S. S. Wagle, First Class Subordinate Judge, with Appellate Powers, at Thana, reversin the decree passed by G. B. Laghate, Subordinate Judge c Bhiwandi.

Suit to recover possession of land

The land in question was purchased by the predecessor o plaintiffs from Ibrahim and Mohidin in 1892. The vendor attorned to the vendees and remained in possession of the land In 1901 the vendors made default in payment of Governmen assessment. The land was consequently forfeited to Government in 1901, under section 56 of the Bombay Land Revenue Code (Bombay Act V of 1879). In 1903, the land was granted by Government to the defendants, under Rules 32 and 62 of the rules framed under section 214 of the Bombay Land Revenue Code, 1879, who thereupon became its registered occupants. In 1904, the Collector ordered the land to be delivered to the plaintiffs, the original occupants of the land. The

unoccupied, and direct that it be dealt with under the rules and orders in force relating to land of that description, or take steps for having it at once lawfully assigned for any such purpose as is described in section 38 of the Land Revenue Code.

Rule 68.—It shall be in the discretion of the Collector to restore any forfeited occupancy at any time on payment of the arrear in respect of which the forfeiture was incurred, together with all costs and charges lawfully due by the defaulter, or, on security being given to his satisfaction for the payment of the said arrears, costs and charges within a reasonable period.

defendants declined to carry out the order. The plaintiffs thereupon sued to recover possession of the land from them.

The defendants contended *inter alia* that they had become registered occupants of the land and that as such they were entitled to remain in its possession.

The Subordinate Judge upheld the defendants' contentions. He held that the Collector's order passed in 1901 deprived the plaintiffs of their right of ownership over the land, that the defendants obtained an absolute title to the land by the re-grant in 1903; and that the Collector's order passed in 1904 did not put an end to the interest acquired by the defendants in the land

On appeal, the First Class Subordinate Judge with Appellate Powers came to a different conclusion. He held that the plaintiffs were entitled, by virtue of the Collector's order of restoration, to recover the land from the defendants.

The defendants appealed to the High Court

N. M. Patvardhan for the appellants.

W. B. Pradhan for the respondents

The following cases were referred to in argument: *Narayan* v. *Parshotam*[1], *Ganparshibai* v. *Timmaya*[2], *Amolak* v. *Dhondi*[3].

CHANDAVARKAR, J. :—The facts are that an occupancy was first declared forfeited under section 56 of the Bombay Land Revenue Code, and thereafter it was disposed of by the Collector as provided for by Nos. 32 and 62 of the rules made under section 214 of that Code. It was disposed of by giving it into the occupation of the defendants, who signed a *kabulayat*, in Form B appended to the rules. Some years after that, the Collector ordered the same occupancy to be taken from the defendants and given to the plaintiffs, who had been the occupants before the forfeiture The only question before us is whether the Collector had power to do this. His proceedings are supported in argument by reliance on Rule 68. Therefore, the question is whether that rule empowers a Collector

[1] (1896) 22 Bom. 369. [2] (1899) 24 Bom. 34.
[3] (1906) 30 Bom. 466.

1911.

DHARMA BAG PATIL v. BALAMIYA.

to do such a thing. Agreeing with the first Court and differing from the appeal Court we hold that it does not. Rule 68 empowers a Collector to restore a forfeited occupancy to the original occupant. But when a forfeited occupancy has been disposed of by grant to a new occupant, it ceases to be a forfeited occupancy and Rule 68 no longer has any application. That rule states the law or a part of the law applicable to lands which are forfeited occupancies; not the law applicable to those lands, which, having once been forfeited occupancies, have, by disposal, according to the rules, become something different.

We allow this appeal, reverse the decree of the lower appellate Court, and restore that of the Court of first instance, with costs both of this appeal and of the appeal to the lower appellate Court on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911. *August 10.*

GHELABHAI GAVRISHANKAR (ORIGINAL PLAINTIFF), APPELLANT, v. HARGOWAN RAMJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu law—Office of hereditary priest—*Yajman vritti*—*Nibandha*—Caste can appoint a priest—Grant from King not necessary—Removal of priest not allowed except on valid ground—Caste—Caste question—Bombay Regulation II of 1827—Civil Court—Jurisdiction.*

Under Hindu law, the office of hereditary priest (*yajman vritti*) is a *nibandha* and is ranked among the hereditary rights of immoveable property.

The office of hereditary priest, where it is held in relation to a family, owes its origin, continuance, and binding character to custom and not to a grant from the King or agreement between the parties.

Where the office is one of hereditary family priest, the mere fact that in any individual case it has been created originally by the caste for the purposes of families belonging to it cannot affect it, because the office carries with it a hereditary right in the nature of property, and the incumbent cannot be deprived of it by anyone, unless he has become a *patita* (outcaste) or has declined to officiate. The caste in such a case makes the selection for the families of its members; and when any family accepts the officiator as its hereditary family priest, custom

* Second Appeal No. 130 of 1910.

annexes to the office certain incidents in the nature of civil rights as against the family, which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu law committed by the officiator, or of refusal by the officiator to discharge his duty as family priest.

1911.

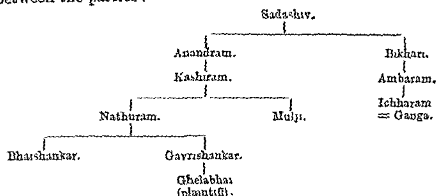
GHELABHAI GAVRISHANKAR v. HARGOWAN RAMJI.

Where a caste has appointed a man to a mere priestly office, there is doubtless no right of property conferred. His continuance or removal is exclusively within the competence of the caste and it is a caste question. But it is difficult where the office of hereditary priest is created for the performance of religious ceremonies in certain families, provided, according to Hindu law, either the caste or the families have power to create such an office and give it the character of immoveable property.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Surat, confirming the decree passed by N. R. Majmundar, Subordinate Judge of Surat

Suit to recover an amount of money as the fees of the *yajman vritti*

The following genealogical tree shows the relationship between the parties .—



The Kasba *tad* of the Kachhia Kunbis of Surat had at first a family priestess named Bai Panba In the year 1739 A. D., the Kasba *tad* by a formal document dismissed her from the office; and appointed one Trikam Vasudeo and his descendants as hereditary priest of the *tad*

Trikam was an ancestor of Sadashiv, who was related to the plaintiff, as shown above.

The *yajman vritti* in question was twice partitioned, once in 1749 A. D., between Anandram and Bhikari, and again in the year 1829 A. D. between Mulji on the one hand and Bhaishankar and Gavrishankar on the other.

1911.

GHELABHAI GAVRISHANKAR v. HARGOWAN RAMJI.

It came up before the Court on three occasions. First, in 1818, when Mulji sued Ambaram for the latter had officiated at a *yajman's* (patron) who had fallen to Mulji's share. He also brought another suit against the *yajman*. Both suits were decided in Mulji's favour; in the one he was awarded Rs. 7 as damages, and in the other he was given an injunction restraining Ambaram from officiating in the families of Mulji's *yajmans*.

Secondly, a few years after this Ambaram again officiated as a priest at some of the *yajman* appertaining to Mulji. It gave rise to a suit by Mulji, Bhaishankar and Gavrishankar against Ambaram and the *yajman* The Court decided the suit in the plaintiffs' favour, and declared that the *yajman* was liable to the plaintiffs for their fees and in future to entertain the plaintiffs only in performing the priestly duties; it also directed Ambaram to pay Rs 35 to the plaintiffs as damages.

The third litigation was commenced in 1899 under the following circumstances Ambaram's son Ichharam having predeceased him, he made a will in favour of Ganga (widow of Iccharam) whereby he bequeathed the whole of his property to Ganga, directing her to maintain herself from the *yajman vritti*. Ganga had a sister Tapi by name She and her husband Ichhashankar began to live with Ganga and the *yajman vritti* was looked after to by Ichhashankar on behalf of Ganga Ganga died on the 15th July 1898 A week after her death the Kasba *tad* of the Kachhia Kunbis appointed Ichhashankar as their "gor" (priest) and passed a formal document appointing him and repudiating Ghelabhai. Thereupon, in 1899, Ghelabhai sued Tapi, Ichhashankar and their son Umedram and obtained a declaration that he (Ghelabhai) as the heir of Ganga and Ambaram was entitled to the *yajman vritti* of the *tad* in question. At the date of these proceedings Ghelabhai was the sole surviving male member in Anandram's branch of the family.

In the year 1901, there were marriages of a son and a daughter of Hargowan Ramji (defendant No. 1), who was a patron in Ambaram's share. Those marriages were performed by Ichha-

shankar's sons; and they received the fees which were payable to them as *kul gors* (family priests).

In 1905, the plaintiff Ghelabhai commenced the present suit against Hargowan (defendant No. 1) and Ichhashankar's sons (defendants Nos. 2-4) to recover from them the amount of Rs. 16-14-0, the damages which he suffered on account of the aforesaid two marriages having been performed by defendants Nos. 2-4. The defendants contended *inter alia* that the suit being one in respect of *yajman vritti* its cognizance by the Civil Court was barred under section 21 of Bombay Regulation II of 1827.

The Subordinate Judge held that the suit was barred by section 20, clause 1 of Bombay Regulation II of 1827, as the question whether the plaintiff was or was not the *kul gor* was a caste question. He, therefore, dismissed the suit as against the defendant No 1. But as regards the remaining defendants, he was of opinion that as between them and the plaintiff the question was *res judicata* on account of the litigation of 1899. He therefore decreed the plaintiff's claim as against those defendants and made them liable to pay Rs. 16-14-0 as damages to the plaintiff.

There were two appeals against this decree. The one was preferred by Ghelabhai (the plaintiff) who sought to make the defendant No. 1 amenable to his claim. The other was preferred by the defendants Nos. 2-4 who contended that the decree was wrongly passed against them.

The District Judge dismissed the plaintiff's appeal; and allowed the appeal by the defendants Nos 2-5, holding that the question involved in the suit was a caste question and that the litigation of the year 1899 did not operate as *res judicata* to the present suit. The following were his grounds :—

"Is the question in suit, *viz.*, the appointment of a *gor* or priest, a caste question within the meaning of section 21 of Bombay Regulation II of 1827? This section, there is little doubt, is an affirmation of the ordinary policy of the British Government in India of non-interference in religious and social matters. The "tad" *gor* is as integral a post of the "tad" organization as the "tad" patel or panch; the *gor's* appointment as shown is the very basis of plaintiff's non-title, *viz.*, the deed of

1911.

GHELABHAI GAVRISHANKAR v. HARGOWAN RAMJI.

appointment of his ancestor at the expense of his predecessor, Bai Panba, has been, as one would expect it to be, peculiarly a caste matter. Applying the test laid down by Sargent, C. J., in *Murari* v. *Suba* (Indian Law Reports, 6 Bom. 725) and by Farran, J., in *Lalji* v. *Walji* (Indian Law Reports, 19 Bom. 517), would the taking cognizance of the matter be an interference with the autonomy of the caste, the answer must be clearly in the affirmative. The *tad* is the best judge of the fitness of its *gors*, and the law precludes the Courts from judging the goodness or badness of the reasons of the *tad* for its appointment, which is essentially a matter of its internal economy and governance. *Jethabhai* v. *Chapsey* (11 Bom. L. R. 1014).

If the question in suit is viewed in its contractual aspect, the result is the same. Firstly, the plaintiff's ancestor was appointed by the *tad* as their hereditary priest and the plaintiff, therefore, is the hereditary priest of the "tad". But at the very time that the *tad* appointed the plaintiff's ancestor they depose his predecessor. Therefore, secondly, the hereditary priest is removable from his office by the *tad*, which has never abrogated its power in this respect. Thirdly, the plaintiff has been so removed by the *tad* from his appointment. Therefore, his right to officiate ceases and no cause of action remained, and no tort has been caused to him by the action of the first defendant in employing the other defendant or by the action of the latter from officiating. The first issue in appeal as to jurisdiction must be answered in the defendant's favour and the suit held barred under section 21 of Bombay Regulation II of 1827 against all the defendants. No other conclusion is possible except on the hypothesis that the *tad*, having once appointed a hereditary priest, have abrogated their right to remove him and his descendants and have given to him and his descendants a right in perpetuity of levying fees from all the persons of the *tad*. Such a legal proposition, I do not hesitate to affirm, is not less repugnant to Hindu notions of the priest or any other caste officer being a servant and not a master of the caste than to English notions of liberty and of liberty of contract. The Hindu hereditary office is, as a general rule, hereditary as between the members of the family and in the absence of interference from the body which appoints and pays; but this hereditary office, however customary, because of the actual small and occasional interference of the appointing authority, has never in the Hindu theory of law been allowed to encroach upon the theoretical power of the appointing authority to depose and to replace; and it would be an extremely one-sided and inequitable application of the English notion of property and one opposed to the practice of the Indian Courts to take away such authority and to impose a perpetual irremovable officer and a perpetual tax."

The plaintiff appealed to the High Court.

L. A. Shah for the appellant.

Coyaji, with *D. A. Khare* and *N. K. Mehta*, for the respondents.

The following authorities were cited in arguments :—West and Buhler's Hindu Law, pp. 174, 411 (3rd Edn); Smriti

Chandrika (Kristnaswami Iyer's Translation), p. 98; Colebrooke's Digest, Book II, Chapter IV, pp. 412, 413; Book V, Chapter II, p. 251, pl 92; Book III, Chapter II, p. 53, pl 6, Yajnyavalkya, verse 318, *Maharana Fatesangji v. Desai Kallianrayaji*[1], *The Government of Bombay v. Gosvami Shri Girdharlalji*[2]; *Krishnabhat Hiragange v. Kapabhat Mahalbhat*[3]; *Balvantrav T Bapaji v. Purshotam Sidheshvar*[4]; and *The Collector of Thana v Hari Sitaram*[5].

1911.

GHULABHAI GAVRISHANKAR v. HARGOWAN RAOJI.

CHANDAVARKAR, J.—The suit, out of which this second appeal arises, was brought by the appellant to establish his right "as hereditary priest of the Kachhia Kunbis of the Kasba section of Surat to officiate as family priest in the family of defendant No. 1". He alleged in his plaint that, from the time of the ancestors of defendant No 1, his ancestors had continued to be their family priests and that the defendant and his ancestors had continued to recognise his own ancestors as their hereditary priests. The claim was thus one known to Hindu law as that of *yajman vritti*, of which the learned editors of West and Buhler's Digest on Hindu Law say (p 411, 3rd Edn.): "The right to the fees and offerings thus becoming due from particular families or classes is regarded as a family estate...a subject for inheritance and partition like other sources of income"

The lower Courts, however, have negatived the appellant's claim on the ground that it involves a caste question. Their reason for so holding is shortly this. They find that the caste, to which the parties belong, had originally appointed one of the appellant's ancestors as "the hereditary priest" of the caste, and that on that account "the hereditary priest is removeable from his office" by the caste. The learned District Judge thinks that, where a caste has conferred a hereditary office of this character, it has the right to take it away, and that the contrary proposition is "no less repugnant to Hindu notions of the priest or any other caste officer being a servant and not a

(1) (1873) 10 Bom. H. C. R. 281.
(2) (1872) 9 Bom. H. C. R. 222.
(3) (1869) 6 Bom. H. C. R (A. O J.) 137
(4) (1872) 9 Bom. H. C. R. 99.
(5) (1882) 6 Bom. 546.

1911.

GIRJABHAI GAVRI-SHANKAR v. HARGOWAN RAMJI.

master of the caste than to English notions of liberty and of liberty of contract." This view of the law ignores the nature of the right which is in dispute in the present case.

"English notions of liberty and of liberty of contract" are out of place in a case arising under Hindu law and custom, which from of old has recognised a kind of estate termed *yajman vritti* and ranked it among hereditary rights of immoveable property. Where a caste has appointed a man to a mere priestly office, there is doubtless no right of property conferred. His continuance or removal is exclusively within the competence of the caste and it is a caste question. But it is different where the office of hereditary priest is created for the performance of religious ceremonies in certain families, provided, according to Hindu law, either the caste or the families, have power to create such an office and give it the character of immoveable property.

In *Krishnabhat Hiragange* v *Kapabhat Mahalbhat*[1] it was said by Couch, C J.: "In Elberling on Inheritance, section 206, it is said that the right of performing the religious ceremonies of certain classes of people as Purohit, is by custom considered analogous to real property; and in 2 Strange H. L 363, Mr. Colebrooke says, that if an office in a family be hereditary, the dues or profits appertaining to it must be subject to be shared; but in such case it classes with immoveables. And it would seem that the classing hereditary offices with immoveable property in section 1 of Regulation V of 1827 was in consequence of the custom amongst Hindus to consider them as such." Gibbs, J., in the same case, pointed out on the authority of Mr. Justice Strange, of Colebrooke, and of Elberling, that the office of hereditary priest is "*vritti*, the same as *nibandha*, hereditary, and, therefore, treated as immoveable" in Hindu law; and that "by custom these offices are considered analogous to real property."

That decision of a Division Bench of this Court was considered and upheld by a Full Bench in *Balvantrav T. Bapaji* v. *Purshotam Sidheshvar*[2].

(1) (1869) 6 Bom. H. C. R. A. C. J. 137. (2) (1872) 9 Bom. H. C. R. 99.

1911.

GHELABHAI GAVRISHANKAR v. HARGOWAN RAMJI.

The question, however, remains whether such an office, being in the nature of that class of immoveable property which is regarded as *nibandha* by Hindu lawyers, can be created except by a grant from the King. That question would appear to have been raised before, but was not decided by a Full Bench of this Court, in *The Collector of Thana v. Hari Sitaram*[1]. The Full Bench said (*p. 559 of the report*). "The Hindu authorities, which we have quoted, seem to show that a pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not. Some of them favour the supposition that a private individual as well as a royal personage may create a *nibandha*. Whether that view is sustainable is a question on which we do not intend to give any opinion, such being unnecessary"

The question arises because of a certain gloss of Vijnaneshwara in the Mitakshara on a *smrti* of Yajnyavalkya, which is translated into English at p. 555 of the report of the said Full Bench case. The *smrti* prescribes the mode in which the King must make grants of land or corody (*nibandha*), if they are to be legal. Vijnaneshwara's gloss explains the meaning of *nibandha* and he then adds: "This," *i. e.*, the *smriti* in question, "indicates that a King alone can grant land or *nibandha*, not the governor of a town or province:" (the Mitakshara, Moghe's 3rd Edn., p. 94).

Vijnaneshwara *in this gloss was merely contrasting* the power of the King with that of his deputy, not with the power of any subject of the King to carve out of his private estate any immoveable property in the nature of *nibandha* by agreement or custom. Nilakantha in his Vyavahara Mayukha defines *nibandha* " (corrody) as what is given by the King, &c., out of the produce of a mine and the like". (Mandlik's Hindu Law, p. 19). This would show that, in Nilakantha's opinion, it is not the King only who can make a grant of *nibandha*. That seems to be also the view of the Smriti Chandrika (T. Kristnaswamy Iyer's 2nd Edn., p. 98, para. 18).

[1] (1882) 6 Bom. 546.

1911.

GHELABHAI GAVRI-SHANKAR v. HARGOWAN RAMJI.

However that be, the office of hereditary priest with reference to a locality, community, caste, or family, is a creature of custom, according to Hindu law, not the result of a grant. There is no authority, so far as we are aware, for the proposition that to be valid and legal it must have had its origin in a grant from the King. In his Digest, Vol. I, p. 377 (3rd Edn.), Colebrooke cites certain texts and the glosses of commentators which bear on this subject. The texts divide "officiating priest" into three classes, of which the first is "an hereditary priest." This class, it is further pointed out there, arises not in virtue of agreement, but from custom. "It is the custom that he, whom the father called to all solemn rites, should officiate also for the son"; and "here proof must be brought from practice." At p. 377 we read. "On this subject it is said the usage is ascertained as implied by this text: thus by saying 'Be my priest (or *purohita*)', he is fully appointed to be priest *of the family* for a long space of time; and whatever be implied, the priest so appointed by the father shall not be forsaken by the son, unless he be guilty of some offence. This, virtually, is the sense *of the text.*" Further on it is said: "If the sacrifice have been uninterruptedly performed by father and son, as family priest, without an express appointment in this form: 'Be my family priest,' what is the consequence? Even in this case, the law concerning hereditary priests is apposite, since such an appointment of father and son is admitted by implication."

It follows from these texts and commentaries cited by Colebrooke that the office of hereditary priest, where it is held in relation to a family, owes its origin, continuance, and binding character, to custom, not to a grant or agreement. And that conclusion was adopted by this Court in *Krishnabhat Hiragange* v. *Kapabhat Mahalbhat*[1].

In the present case it is found by the Courts below that the hereditary office of family priest was vested in the plaintiff's family by the caste to which the parties belong about 150 years ago and that the plaintiff's family has held the office with

(1) (1869) 6 Bom. H. C. R. A. C. J. 137.

erence to the defendant's family during that period. The er appellate Court has, however, held that the plaintiff's im raises a caste question which is outside the jurisdiction of Civil Court. That view of the claim gives the go-by to the ential nature of the office and the right attached to it by stom. If the office is one of hereditary family priest, the re fact that in any individual case it had been created ginally by the caste for the purposes of families belonging it cannot affect it, because the office carried with it a heretary right in the nature of property, and the incumbent uld not be deprived of it by anyone, unless he had become a *tita* (outcaste) or had declined to officiate. The caste in ch a case made the selection for the families of its members; d when any family accepted the officiator as its hereditary mily priest, custom annexed to the office certain incidents the nature of civil rights as against the family, which either the family nor the caste has power to annul except on e ground of some offence under the Hindu law committed y the officiator, or of refusal by the officiator to discharge his uty as family priest.

This conclusion is supported by the result of the litigation etween the ancestors of the parties to the present suit, once n 1818 and the second time in 1834. In the litigation of 1818 he Court consulted a Shastri and his opinion was as follows see Exhibit 93): "If there be 13 *tads* in a caste, and if each *ad* has its separate hereditary priest, the men of the *tad*, even if they wish, have no right to remove that priest, so long s he has not become *patita* (fallen from virtue, an outcaste), neither can he be removed by the men of the 13 *tads*." The Court, acting on that reply, decided in favour of the present plaintiff's ancestor's right as hereditary priest. To the same effect was the decision in 1834. That was by the Sudder Divani Adalut in Special Appeal No. 608 of 1834 (see Exhibit 49). That decision also was arrived at after consulting a Shastri. Reference can also be made to the case of *Ramasawami Aiyan* v. *Venkata Achari*[1] and to the practice on this side of

[1] (1863) 9 M. I. A. 348 at pp. 374, 384.

1911.

HELABHAI GAVRI-SHANKAR v. MAHAGOWAN RAMJI.

India indicated in the case of *Dinanath Abaji* v. *Sadashiv Hari Madhave*(1).

We may point out that any other view would be disastrous to Hindu society as it is constituted. Hereditary priesthood vested in particular families is regarded as *vritti* or immoveable property which is the source of their maintenance Such families have for generations lived on these *vrittis*; and to turn them adrift now on the ground that their castes can take away their hereditary rights would be not only contrary to the nature of the right, created by custom, but it would amount to spoliation. It is virtually telling these hereditary priests that they must hereafter live on some other property than that on which they have lived as their *vatan*, so to say, for generations, and that their ancestors were badly advised in turning their families into an hereditary priesthood for their maintenance in reliance on their castes To the enlightened sentiment of the present day it does indeed seem unfair and oppressive that a man should be compelled by law to receive religious ministrations from another person who is not of his choice, and that simply because that has been the course of the relations of the families of both for generations on the ground of hereditary rights But if a Hindu wishes to remain a Hindu and have the benefit of his religion, he must take its burden also, when that burden is annexed to the benefit by Hindu law on the ground of custom.

The plaintiff's family have been found in this case to have officiated as hereditary priests of defendant's family for at least one hundred and fifty years. According to Hindu law, long enjoyment of property—either for one hundred years or from grandfather to grandson—is conclusive evidence of a legal right when its origin cannot be ascertained (see Mitakshara, Moghe's 3rd Edn, pp. 128 and 129). Here the hereditary office concerned is immoveable property, according to Hindu law. The plaintiff is, therefore, entitled to succeed.

The decree is reversed and the claim awarded with costs throughout on the respondents.

Decree reversed.

R. R.

(1) (1878) 3 Bom. 9.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

MERALI VISRAM (ORIGINAL DEFENDANT 4), APPLICANT, v. SHERIFF DEWJI AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

1911. *August 16.*

Civil Procedure Code (Act V of 1908), section 115—Award—Decree framed upon award—Appeal—Application under revisional jurisdiction—Decree set aside—Grounds—Jurisdiction.

The plaintiff, as Mutawali of a Musjid at Zanzibar, brought a suit against the defendant for the recovery of certain pots and pans. Three other persons, who alleged themselves to be Mutawalis, were joined as parties apparently without any amendment of the plaint. After some progress of the suit, the presiding Judge was asked by all concerned in the Jamat (community) to arbitrate upon all matters in difference between them. The Judge framed an award on the 30th June 1904 and the award was read out in Court after notice to the parties. In the year 1909 a pleader for the plaintiff applied to have a decree framed in the terms of the award and the Judge accordingly passed a decree on the 7th April 1909

One of the defendants having appealed against the decree which was not appealable, the appeal was allowed to be converted into an application under the revisional jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) and the decree was set aside as being passed by the Judge without any sort of jurisdiction whatever. The grounds being :—

(1) There was no written reference to arbitration as required by law.

(2) The reference was made by a great number of persons who were not parties to the suit.

(3) The matters in difference submitted to arbitration were matters not in suit at all.

(4) The result of the said irregular proceedings was to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment and no suit of the kind could have been properly launched without the previous sanction of the Advocate General or such officer as is clothed with his functions.

(5) The award was made on the 30th June 1904 and the application to have it filed was not made till 1909. The application was, therefore, manifestly time-barred.

(6) The plaintiff died early in the year 1905 and no application was ever made to bring his heirs or legal representatives on record. The suit had, therefore, abated by July of that year.

---

* Application No 173 of 1911 under the extraordinary jurisdiction. Appeal No. 97 of 1910 converted into application.

1911.

MURALI VISRAM v. SHERIFF DEWJI.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decree of Lindsey Smith, Judge of His Britannic Majesty's Court at Zanzibar, in Suit No. 81 of 1903.

One Sheriff Dewji, son and constituted attorney of Dewji Jamal, sued the defendant Remtulla Allarakhia Tejani for the recovery of certain cooking utensils which the plaintiff alleged he was entitled to as Mutawali of the Shia Itnashari Mosque. The proceedings in the suit commenced in February 1902 before His Honour Judge Piggott and subsequently they grew and expanded, new parties being added and new issues raised; at length it was left to His Honour Judge Smith to decide as arbitrator with full powers practically one issue, namely, "Who are or ought to be Mutawalis of this Mosque." With respect to the said issue the Judge remarked:—

The only other point, viz., as to who are entitled to the cooking utensils is a very unimportant one and was only raised, I think, to bring the question of Mutawaliship to an issue It is agreed that the members of the Itnashari community are entitled to use these vessels and the evidence shows that they are always kept at the Mosque, so whether they are under charge of Mutawalis of Mosque or Moonim of Jamat seems to me immaterial.

The Judge accordingly framed his award on the 30th June 1904 and pronounced judgment Subsequently the Court was moved to pass a decree in the terms of the award and the Judge, on the 7th April 1909, passed the following decree:—

This case coming on for hearing before His Honour Judge Lindsey Smith and after examination of several witnesses it was subsequently referred with the consent of all the parties to the suit to the sole arbitration of His Honour Judge Lindsey Smith Judgment having been pronounced according to the award of the sole arbitrator it is hereby declared that four persons, namely, Sheriff Dewji, Saleh Hassan, Suleman Versi and Dharamsi Khatao, are hereby appointed Mutawalis. It is further ordered that should any of these four die or retire or change their faith then the Jamat are to select another in his place, the name to be afterwards put before the Senior Judge for his sanction. If, however, there are any of the descendants of the four Mutawalis mentioned in the deed, dated 1st August 1881, who wish to be elected Mutawalis and are eligible for the post, they must be given preference over all other candidates. Should any Mutawali become ill or leave Zanzibar he may appoint an attorney in his place, but if he is away from his duties more than 12 months such attorney shall not act without the approval of the Jamat and Judge. If the attorney be not so approved and the Mutawali does not

return within 3 months the post is to be considered vacant. With regard to the cooking pots claimed in the plaint, it is declared that they are part of the Mosque property. Should, however, it be more convenient that they be under the charge of the Jamat the Mutawalis should give them over to the Jamat, the Jamat paying a small fee or rent for them. It is further ordered that 2nd, 3rd and 5th defendants do pay the sum of Rs. 300 costs. No costs against 1st defendant, nor against the 4th defendant as he was only a formal defendant.

1911.

MERALI VISRAM v. SHARIFF DEWJI.

7th April 1909. (Sd.) LINDSAY SMITH.

Defendant 4 preferred an appeal, No. 97 of 1910, but as the decree was not appealable, the Court, after hearing arguments on the point, allowed the appeal to be converted into an application under the revisional jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908).

Jinnah with *Mirza and Mirza* for the appellant-applicant (defendant 4).

G. K. Parekh for the respondent-opponents (plaintiffs).

BEAMAN, J.—This was an appeal against a decree purporting to be made upon an award of the 30th of June 1901 in His Britannic Majesty's Court at Zanzibar, the decree itself, giving effect to the award, was not made until the 7th April 1909.

The appellant is met at the outset with the objection that no appeal is allowed against the decree passed upon an award, except in so far as that decree can be said to be in excess or contravention of the terms of the award; and it became very clear that this objection must prove fatal to the appeal, as brought.

Mr. Jinnah for the appellant then asked the leave of the Court to convert the appeal into an application under section 115 of the Code of Civil Procedure. It has, I think, been the practice of this Court always to allow, in proper cases, appeals to be so converted into applications for the exercise of this Court's power of superintendence and revision. We, therefore, acceded to Mr. Jinnah's request, and we have dealt with what was originally brought before us as an appeal on the footing of its being an application under section 115

It was contended for the respondents that this Court had no power under section 115 to superintend or revise the proceed-

1911.

MEHRALI VISRAM v. SHERIFF DEWJI.

ings of His Britannic Majesty's Courts in Zanzibar, and we were referred to the decision of a full Bench of this Court in *Khoja Shivji* v. *Hasham Gulam*(1). That case, however, is no longer good authority; for clause 29 of the Council Order relating to Zanzibar of the year 1897, is differently worded, and we think advisedly differently worded, so as to confer upon this Court powers of revision over all the Civil Courts of Zanzibar We think that the application is well founded and that there are more than usually numerous as well as cogent reasons for allowing it

The facts of the case, so far as they are material, are briefly these. A suit was brought in 1903 by a plaintiff, resident in Bombay, through his son, his constituted attorney, against a single defendant, resident within the jurisdiction of the Court of Zanzibar, for the recovery of certain pots and pans, to which the plaintiff alleged himself to be entitled, as Mutawali of a Musjid This being the extent of the plaintiff's prayer the litigation began to grow in the first instance, apparently by the addition to the record of three other persons, who were alleged to be Mutawalis. But we are unable to discover that either then or at any subsequent period, any amendment was made of the plaint so as to enlarge the original prayer. The case passed through the hands apparently of Judge Piggott, and from him into the hands of Judge Smith, who, it appears from these proceedings, was asked by all concerned in the Jamat to arbitrate upon all matters in difference between them. His award is dated the 30th of June 1904; and it appears that this award was read out in Court, after notice was given to the parties.

Nothing more was done until 1909, when Mr. Framji, describing himself as pleader for the plaintiff, applied to have a decree made in terms of the award, and we are told that after only three hours' notice given to the defendants, the decree which is now made the subject of this revisional application, was passed on the 7th April 1909.

(1) (1895) 20 Bom. 480.

Now there appear to us at least six sufficient reasons, to which it would not be difficult to add others, for the conclusion that not only has the learned Judge below exceeded his jurisdiction, but that in the exercise of such jurisdiction, as he had, he has acted both illegally and with material irregularity.

(1) There was no written reference as required by law; and although that in itself might not have been a sufficient reason, it at least undermines the foundation of the jurisdiction.

(2) The reference to arbitration, so far as we are able to gather from the materials before us, was made by a great number of persons who were not parties to the suit.

(3) The matters in difference which were submitted to the arbitration of Judge Smith were matters not in suit at all.

(4) The result of these highly irregular, and we cannot help feeling, in the technical sense, illegal proceedings, has been to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment. There is this further objection that no suit of that kind could properly have been launched without the previous sanction of the Advocate General, or such officer, as in Zanzibar, is clothed with his functions.

(5) The award having been made on the 30th of June 1904 and no application to have it filed having been made till 1909, such application is manifestly time-barred

(6) The plaintiff died early in the year 1905, and as no application was ever made to bring his heirs or legal representatives on the record, the suit had abated by July of that year.

The proceedings then of April 1909, purporting to be made in the suit and bringing it to its completion, were made some four years after that suit had abated and no longer existed. It is therefore clear that acting as he did in April 1909, the learned Judge far exceeded his jurisdiction, or perhaps it would be more correct to say was acting entirely without any sort of jurisdiction whatever.

It was contended on behalf of the respondents that there is the highest authority for holding that this Court will not

1911.

MERALI VISRAM v. SHERIFF DEWJI.

interfere in the exercise of its revisional powers with decrees passed upon awards, appeals against which have been expressly forbidden by the Legislature. In this connection we have been referred to the well-known case of *Ghulam Jilani* v. *Muhammad Hussan*[1]. But while fully recognizing the principle laid down by their Lordships of the Privy Council in that case, we do not think it has any applicability to such a state of facts as we have here to deal with. If the applicant were debarred from right of appeal and were also debarred from obtaining redress by recourse to this Court under section 115, it is difficult to say in what way he could be protected against the consequences of a procedure, so entirely unauthorized from first to last by any law, and we cannot bring ourselves to believe that there can be so patent a wrong, without its proper remedy, in allowing this application. Therefore, we do not feel that we are in any way contravening, as we certainly do not intend to contravene, the principle insisted upon by their Lordships of the Privy Council in the case cited.

We think that this application must be allowed and that the decree of the Court of His Britannic Majesty at Zanzibar must be set aside as having been arrived at wholly without jurisdiction and in its present form, in law, a mere nullity. The respondents must pay all costs of this proceeding and costs of the lower Court of the 7th April 1909.

Decree set aside.

G. B. R.

(1) (1901) L. R. 29 I. A. 51.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward

SALEBHAI ABDUL KADER BASRAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. BAI SAFIABU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1911. *August 23*

Limitation Act (XV of 1877), Article 123—Suit to recover legacy—Legacy not assented to by executor—Probate and Administration Act (V of 1881), section 112—Mahomedan Law—Shiahs—Wakf—Bequest for Gadi-ul-khum feast—Fattiah dinners—Valid bequest—Cypres.

Article 123 of the second Schedule of the Limitation Act, 1877, applies to a suit where the substantial claim is to recover a legacy, even though not assented to by the executor, and whether or no the suit involves the administration of the whole estate.

A Shiah Mahomedan directed his executors by his will to spend a portion of the income of his property upon the following charitable or religious objects. (1) The Gadi-ul-khum feast at Mecca, (2) The Gadi feast at Rehmanpura in Surat; and (3) A Fattiah dinner on the testator's and his wife's account. The Gadi feasts were to celebrate the appointment of Ali as successor of the Prophet.

Held that the first two bequests were valid, but the validity of the third bequest was doubtful.

Kaleloola Sahib v. *Nuseerudeen Sahib*(1), *Zooleka Bibi* v. *Zynul Abedin*(2) and *Biba Jan* v. *Kalb Husain*(3), followed.

Where the testator has indicated a general charitable intention in the bequest made by him and if these bequests fail, the Court can devote the property to religious or charitable purposes according to the *cypres* doctrine

FIRST appeal from the decision of J. E. Modi, Subordinate Judge, First Class, Surat.

One Ismailji Dossabhai was married to Kulsambu, and had by her three daughters. (1) Fatma (defendant No. 1), Zenabu (defendant No 3) and Ratanbu (who predeceased her father). Before his death, Ismailji made his will, of which he appointed Fatma as the sole executrix. Under his will, he set apart a third share of his property for the religious and charitable purposes enumerated in paragraph 4 of his will, set out in the

* First Appeal No. 209 of 1909.

(1) (1894) 18 Mad. 201 (2) (1904) 6 Bom. L R. 1058.

(3) (1908) 31 All 136.

1911.

SALEBHAI ABDUL KADER v. BAI SAFIABU.

judgment. The remainder of his property he bequeathed to his heirs. The share which he bequeathed to Ratanbu was described as follows :—

To the children of my deceased daughter Ratanbu (her, *i. e.*) the deceased Ratanbu's share shall be given in equal parts and I appoint her children as (my) heirs. To them (their deceased mother's share) shall be duly given in equal parts

The plaintiffs, the heirs of Ratanbu, filed this suit to recover the share bequeathed to them by Ismailji.

Fatmabu (defendant No 1) contended *inter alia* that the testator had no right to make Ratanbu's issue his heirs in the manner he had done and that the plaintiffs were not entitled to any share

The Subordinate Judge held that the bequest to charity constituted valid Wakf; but he held that the suit was governed by Article 120 of the second Schedule to the Limitation Act (XV of 1877), and was barred.

The plaintiffs appealed to the High Court.

B J Desai, with *T. A. Gandhi*, for the appellants.

Weldon, with *Little & Co*, for respondents Nos. 2b and 2d.

T A Gandhi for respondents Nos. 4 and 5.

BEAMAN, J —The plaintiffs sued the executrix and other heirs under the will of their deceased grandfather Ismailji to recover a legacy alleged due to them under the will of the said deceased Ismailji.

The defendants pleaded that the claim was time-barred ; that the legacy was invalid to more than the extent of one-third of the estate owing to the want of assent of the other heirs ; that the legacy could not be given effect to owing to more than one-third of the estate having been already left by a prior clause of the will in Wakf.

The original Court decided that the suit was time-barred ; that the legacy was invalid to more than the extent of one-third of the property ; that there was no assent of the other heirs and that the legacy could, therefore, not be given effect to as one-

1911.

SALLEHAI ABDUL KADER v. BAI SAFIABU.

third of the property had been validly left by a prior bequest in Wakf. The original Court, therefore, dismissed the suit with costs.

On appeal it has been argued with regard to the question of limitation that the Article applicable was not Article 120 but Article 123 of the first Schedule of the Limitation Act. It has been contended in answer that the suit was really an administration suit or one for an account, falling under the general provisions of Article 120, as the legacy did not receive the assent of the executrix under section 112 of the Probate and Administration Act, V of 1881, and was, therefore, inchoate and could not be made the basis of a suit for a legacy. In support of that contention several cases were quoted, but after giving them our best consideration it appears to us that they do not support the contention. The most that can be deduced from them is that where there has been no assent of the executor then the suit must include a demand for the administration of the whole estate. The cases included those of *Cursetjee Pestonjee Bottliwalla* v. *Dadabhai Eduljee*[1], *Okhoy Coomar Bonnerjee* v. *Koylash Chunder Ghosal*[2] and *Rajamannar* v. *Venkatakrishnayya*[3] It appears to us that the mere want of assent of the executrix cannot alter the substantial nature of the suit, which was to recover the legacy. Article 120 is merely an Article referring to suits for which there is no other provision in the Schedule It is not an Article referring specifically to administration suits. Article 123 is, therefore, the Article applicable, where the substantial claim is to recover a legacy, whether or no the suit involves the administration of the whole estate This suit must accordingly be held to have been brought within time as it was brought within the twelve years allowed by Article 123. It is unnecessary in this view of the case to deal with the further arguments based upon the minority of one of the parties and the alleged extension in favour of all of the period of limitation.

(1) (1896) 19 Mad. 445 (2) (1890) 17 Cal. 367.
(3) (1902) 25 Mad. 361 at p 364.

1911.

SALEHBHAI ABDUL KADER
v.
BAI SAFIABU.

With regard to the question of the assent of the other heirs to the legacy it is sufficient to say that the matter has not been seriously pressed before us, as there was no evidence of the assent of *all* the heirs.

With regard to the question whether the prior bequest in Wakf was valid, it is necessary to consider in some detail the terms of the bequest occurring in paragraph 4 of the will as follows:—

"As to whatever may come to in respect of a third share that is in respect of a third portion and of any abovementioned property, and of such property, my executrix Bai Fatmabu shall duly do such act as may perpetuate my name and as may do good. In lieu of the said amount (? I have set apart) one house and a moiety of another house in Bombay the particulars whereof are mentioned in the abovewritten second clause. As to whatever income may be realised on the expenses relating to those houses being deducted the said income shall be appropriated towards the performance of the following works:—

"I have been giving Gadi-ul Kumi feast at the holy Mecca through Mr. Abdul Ali Nakhuda. The same shall duly be given.

"I have been giving a 'Gadi' feast at Rehmanpura in Surat, the same shall be given.

"According to these particulars and agreeably to what is written above the same shall be done and as to whatever may remain over on that being done my said executrix shall give therewith a Fattiah dinner on my and on my wife Kulsambu's account, and I have given full authority to my said executrix . . to do the abovementioned work. She shall do the same during her life-time and after her (decease) her children shall do the same."

The question of the validity of these bequests has been considered at considerable length by the learned Judge of the original Court from pages 8—11 of the printed judgment, and he came to the conclusion mainly it appears from certain *dicta* of Ameer Ali, that the bequests were good bequests as Wakf. It appears to us that the two first bequests at all events being for the celebration of the appointment of Ali as successor of the Prophet were properly held to be valid Wakfs. In paragraph 322 of Wilson's Anglo-Mahomedan Law, it is stated that "all works of religion, charity, or public utility, not condemned by the Mahomedan religion, are proper objects of Wakf" on the authority of the Hedaya.

But it is open to question whether the third bequest for Fattiah dinners "on my and my wife Kulsambu's account" is

1911.

SALEBHAI ABDUL KADER v. BAI SAFIABU.

a valid Wakf. It is pointed out by Wilson in paragraph 323A of his work that the Madras High Court has recently held such a bequest not to be a valid Wakf in the case of *Kaleloola Sahib v. Nuseerudeen Sahib*[1] A similar question also arose in the case of *Biba Jan v Kalb Husain*[2]. And in the case of *Zooleka Bibi v Syed Zynul Abedin*[3], it was held by Tyabji, J. "that there is nothing in the Mahomedan Law to justify the tying up of property for the purpose of maintaining the tombs of ordinary individuals It can only be done with respect to shrines and tombs of great religious teachers which are regarded with very considerable feeling of reverence and sanctity by various Mussulman Communities throughout the world"

But however that may be, it appears to us looking to the fourth paragraph of the will as a whole that the testator undoubtedly had a general charitable intention, and that consequently even if the third bequest in favour of the Fattiah dinner should fail, the property would have to be devoted to religious or charitable purposes according to the *cypres* doctrine. The property actually bequeathed in Wakf was the "one house and a moiety of another house in Bombay" It is not possible in this suit to decide exactly how that property should be devoted to religious or charitable purposes That would be a matter for consideration and decision in separate proceedings properly instituted by those interested in the religious or charitable purposes on the principles stated in the Tagore Law Lectures for 1907, by Abdur Rahim, at p. 305 · - "If, however, the specified objects be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the Wakf will be good and the income or profit will be devoted for the benefit of the poor, and in some cases, to objects as near to the objects which failed as possible. This rule is analogous to the doctrine of *cypres* of the English law." All that can be decided in this suit is that the "one house and moiety of another house in Bombay" were validly bequeathed in Wakf.

(1) (1894) 18 Mad. 201. (2) (1908) 31 All. 136.
(3) (1904) 6 Bom. L. R. 1058.

1911.

SALEBHAI ABDUL KADER v. BAI SAFIABU.

That being so, the only question remaining to be decided is whether upon an administration of the whole estate there would remain any balance out of the one-third alone available for bequests to satisfy the legacy in suit after deducting the value of the two houses validly bequeathed in priority in Wakf. For this purpose it will be necessary to remand the case to the original Court for a complete administration of the estate.

We, therefore, reverse the decision of the lower Court upon these preliminary issues and remand the case for a complete administration of the estate, with reference to the foregoing observations and Order XX, rule 13 of the first Schedule of the Civil Procedure Code.

Costs to be costs in the administration

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr. Justice Hayward.

1911.
August 7.

TANAJI DAGDE (ORIGINAL PLAINTIFF), APPELLANT, v. SHANKAR SAKHARAM (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, Rule 11—Appeal—Summary dismissal—Judgment not necessary—Lower appellate Court.

In dismissing an appeal under Order XLI, Rule 11, of the Civil Procedure Code (Act V of 1908), it is not obligatory upon the lower appellate Court to write a judgment.

SECOND appeal from the decision of H. S Phadnis, District Judge of Khandesh, confirming the decree passed by K. G. Tilak, Subordinate Judge at Yaval.

The plaintiff sued to recover possession of certain land from the defendant, who contended that he was the real owner of the land and that the plaintiff was only a *benamidar* of his. The Subordinate Judge upheld the contention and dismissed

* Second Appeal No. 470 of 1910.

the suit. The plaintiff appealed to the District Judge, who dismissed the appeal summarily under Order XLI, rule 11, of the Civil Procedure Code (Act V of 1908), and wrote the following judgment . " The lower Court has given good reasons for holding that plaintiff-appellant was a mere *benamidar* for the defendant-respondent (who is in possession) and not a real purchaser."

The plaintiff appealed to the High Court.

D. W Pilgaumkar, for the appellant.

M. V. Bhat, for the respondent.

BEAMAN, J :—Both the Courts below have found that the purchase at the Court sale was a *benami* transaction. Either this *benami* transaction was free from or tainted with fraud. If free from fraud then the decision of the Courts below would be clearly right If tainted with fraud, and this appears to be the truth from the defendant's own pleadings, then both the plaintiff and the defendant must be taken to have been parties to this fraud upon innocent third persons ; and so the old rule, which was laid down more than a century ago, to govern such cases would in my opinion apply . " Let the estate lie where it falls." Here in the events that have happened the estate has fallen into the hands of the defendant, and I can see no equitable ground upon which the plaintiff, himself a party to the fraud, as he now alleges, could expect us to transfer it from the defendant to himself I think that while section 66 of the Code of Civil Procedure (Act V of 1908) has no applicability directly to a case of this kind, it may be doubted whether the commentary upon it, relied upon in the arguments here and in the Court below, does not go too far. I merely make that observation, because that commentary appears to have influenced the mind of the Judge of the first Court. It is not, however, any part of the ground upon which I think that this case ought to be decided.

For these reasons, I am of opinion, that the decision of the Court below is right and that this appeal must be dismissed with all costs.

1911.

TANAJI DAGDE v. SHANKAR SAKHARAM.

HAYWARD, J.:—I concur and have only to add some remarks with regard to the point raised that the judgment of the lower appellate Court was insufficient under Order XLI, Rule 11, read with Rule 31 of the First Schedule of the Code of Civil Procedure. It was said in the case of *Puttapa* v. *Yellappa*[1] by a Bench of this Court, that a formal judgment was necessary in the case of an appeal dismissed without sending notice to the lower Court. But it is to be observed that no reasons were assigned for that decision. There is also to the same effect the case of *Rami Dela* v. *Brojo Nath Sarkar*[2] decided by the Calcutta High Court but a different view was, after commenting thereon, taken in the case of *Samin Hasan* v. *Piran*[3] by the Allahabad High Court. These decisions were, however, under sections 551 and 574 of the old Code of Civil Procedure of 1882 and what has now to be considered are the corresponding provisions of Order XLI, Rules 11 and 31, of the First Schedule of the new Code of 1908.

Now Order XLI is divided under several headings and Rule 11 comes under the heading "Procedure on admission of appeal" and provides that "The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader." If the appellate Court does not so dismiss the appeal, it is provided under the same heading that a day shall be fixed for hearing the appeal after procuring the record and giving notice to the respondent or his pleader. But there is no provision requiring any formal judgment.

The next heading of the Order is "Procedure on hearing" and thereunder provision is made in Rules 17 and 18 for dismissal of the appeal for default of appellant and in the remaining Rules for the procedure to be observed at the hearing of the appeal. But here again there is no provision for any formal judgment.

(1) (1903) 5 Bom. L. R. 231. (2) (1897) 25 Cal. 97.

(3) (1908) 30 All. 319.

1911.

TAMAJI DADPE v. SHANKAR BAKHARAM.

It is not until under the following heading "judgment in appeal" that such provision occurs and under that heading Rule 30 provides that "The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court" and Rule 31 provides that "The judgment of the appellate Court shall be in writing and shall state the points for determination, the decision thereon; the reasons for the decision"; and certain other matters. It is to be observed that these provisions apply in their entirety only to regular hearings at which issues are raised in the presence of the parties with the record before the Court.

It appears to me therefore, looking to Order XLI as a whole, and to the position in it of Rule 11, relating to the summary dismissals of appeals, as also of Rules 17 and 18, relating to dismissals for default of the appellant, and having regard to the practical difficulty of applying to any such dismissals the provisions of Rules 30 and 31 relating to judgments, that those provisions cannot be held, and were never intended by the Legislature to be held, applicable to any but regular hearings of appeals in the presence of the parties and with the record before the Court.

BEAMAN, J.:—I entirely concur.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heyward.

1911. *August 10*

TRIKAM PURSHOTTAM (ORIGINAL PLAINTIFF), APPELLANT, v. NATHA DAJI, SON OF BAI ADI (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Vyavahara Mayukha—Succession—Step-sister—Paternal uncle—Priority.

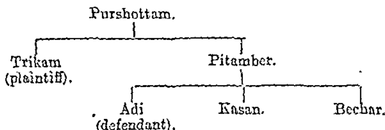
According to Hindu Law, as administered under the Vyavahara Mayukha, the half-sister of the propositus is entitled to succeed in preference to his paternal uncle.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the decree passed by K. V. Desai, Subordinate Judge of Nadiad.

Suit to recover possession of property.

The property in dispute belonged originally to one Pitamber. He had a brother Trikam (the plaintiff) who was separated from him. Pitamber first married Jatan, and had by her a daughter Adi (the defendant). Jatan died. He then married Divali, and had by her a son Bechar and a daughter named Kasan. On Pitamber's death Bechar inherited his property. Divali and Kasan died during Bechar's life-time. Bechar died in 1904.

The parties lived at Nadiad, a town in the Kaira District, and belonged to the *kachhia* caste (vegetable sellers). Their relationship is shown in the following genealogical tree:—



On Bechar's death, the plaintiff, who was a paternal uncle of his, filed a suit against Adi (the step-sister of Bechar) to recover possession of property, claiming that he was under Hindu Law a preferential heir.

* Second Appeal No. 397 of 1909.

The lower Court disallowed his claim holding that Adi, as step-sister of Bechar, was to be preferred to the plaintiff who was his paternal uncle.

The plaintiff appealed to the High Court. Adi having died was represented by her son Natha Daji.

T. R Desai, for the appellant:—The author of the Vyavahara Mayukha makes a distinction between full-brother and half-brother He first brings in full-brother, then full sister; nephews, grandmother and then half-brother would come in (see Chapter IV, section 8), Mandlik, p. 81. But there is no mention of half-sister She can therefore only come in as a distant relation. If now, she is included in the term full sister then there would be an anomaly, *viz.*, a half-sister would take before a half-brother Nilkantha has undoubtedly given a special position to the sister in the line of heirs, a position which is denied to her in the other presidencies. A half-sister should not be allowed to partake this special position. Refers to *Sakharam Sadashiv Adhikari* v *Sitabai*[1]; *Dhondu Gurav* v *Gangabai*[2]; *Lakshmi* v. *Dada Nanaji*[3]; *Biru* v. *Khandu*[4], *Kumaravelu* v. *Virana Goundan*[5].

L. A Shah, for the respondent:—The case of *Kesserbai* v. *Valab Raoji*[6] governs this case In that case, the half-sister was preferred to the uncle's widow. She would be preferred to an uncle The distinction of whole and half-blood is confined to brothers alone. See *Vithalrao* v. *Ramrao*[7]. Refers to *Russoobai* v. *Zoolekhabai*[8].

CHANDAVARKAR, J.—The question of Hindu Law arising in this second appeal, is, whether under the Vyavahara Mayukha the half-sister or paternal uncle of the propositus is to be preferred as heir Both the Courts below have preferred the half-sister; and, in our opinion, they are right. It is admitted for the appellant that a full-sister is entitled to come in as heir before the paternal uncle; but it is argued that it is so

(1) (1879) 3 Bom. 353.
(2) (1879) 3 Bom. 369.
(3) (1879) 4 Bom. 210
(4) (1879) 4 Bom. 214.
(5) (1879) 5 Mad. 29.
(6) (1879) 4 Bom. 188.
(7) (1899) 24 Bom. 317.
(8) (1895) 19 Bom. 707.

1911.

KESHAV v. JAIRAM.

An Assistant Collector, who is placed in charge of portions of a district under section 10 of the Bombay Land Revenue Code (Bombay Act V of 1879), has the power to exercise all the powers conferred upon the Collector by section 23 of the Bombay Mamlatdars' Courts Act (Bombay Act II of 1906).

THIS was an application under section 115 of the Civil Procedure Code (Act V of 1908), to revise the order passed by N. J. Wadia, Assistant Collector of Sholapur, reversing the order passed by J. R. Gaikwad, Mamlatdar of Karmala.

Keshav and his brother filed a suit under the provisions of the Bombay Mamlatdars Courts Act (Bombay Act II of 1906) in the Court of Mamlatdar of Kamala, praying for an injunction restraining the defendants from disturbing them (the plaintiffs) in their possession of certain lands. The Mamlatdar decided the suit in the plaintiffs' favour. The defendants preferred an application for revision to the Collector. It was heard by the Assistant Collector who was placed in charge of portions of the district under the provisions of section 10 of the Bombay Land Revenue Code (Bombay Act V of 1879). In view of certain documents that were produced before him, the Assistant Collector revised the order passed by the Mamlatdar and dismissed the suit.

The plaintiffs applied to the High Court.

Branson, with *N. V. Gokhale*, for the applicants.

K. H. Kelkar, for the opponents.

BEAMAN, J.—This rule was issued calling upon the opponent to show cause, why an order passed by Mr. Wadia, Assistant Collector of Sholapur, purporting to revise the decree of a Mamlatdar's Court, should not be set aside, as being in the first place a nullity, or failing that, as having been made without jurisdiction or in excess of the jurisdiction vested in that Officer.

The principal point to which our attention has been invited is whether an Assistant Collector, merely in virtue of being placed in revenue charge of certain portions of a district, is thereby empowered to exercise all the powers conferred upon the Collector of the district by section 23 of the Mamlatdars' Courts Act (Bombay Act II of 1906).

On a first view, it would appear that an Assistant Collector could not be so authorized; but in opening his case Mr. Branson very candidly, and very rightly, I think, drew our attention to section 10 of the Land Revenue Code; and after having given that section our very best and most careful attention, with special reference to the arguments which Mr. Branson has used against its applicability here, we feel unable to escape from the force of the direct language used. If language is ever to mean anything, when it is perfectly plain and unambiguous, the language of this section, we think, must be taken in its natural sense. That section enacts that after certain conditions precedent have been fulfilled, an Assistant *Collector thus placed in charge of portions of a district is* empowered to exercise all the powers conferred upon the Collector by this Act or any other law at the time being in force within the local limits of that portion of the district, of which he has been placed in charge. It has been very strenuously contended that the words "or any other law at the time being in force" having regard to the general structure of the section and to its place in the Land Revenue Code, ought to be restricted to laws or Acts *ejusdem generis*: but we think that that would be stretching interpretation too far; and had we had any doubt of what Government intended when this Land Revenue Code was passed, a Resolution, (which of course is no binding authority upon us, but serves to throw useful light upon this question, cited in a *footnote* to section 10 in Sathe's Edition of the Land Revenue Code), goes far to dispel that doubt.

We were referred in the course of the argument to an unreported decision of Jenkins, C. J., and Batchelor, J., upon what appears to have been a very similar point. There the Rule was made absolute, but no reasons were given. I have consulted my Brother Batchelor and he assures me that so far as his memory goes section 10 was never referred to in that argument or brought to the notice of that Bench.

The recent case of *Somchand Bhikhabhai* v. *Chhaganlal*[1], decided by Scott, C. J., and Batchelor, J., under section 11 of

[1] (1911) 35 Bom. 213.

1911.

KESHAV v. JAIRAM.

the Land Revenue Code, plainly turned upon a different point and is governed by quite different principles.

Here, we think, we must give its natural effect to the language of section 10 and hold that an Assistant Collector put in charge of any portion of a district is within that portion of the district clothed with all the authority and powers of a Collector conferred by the Land Revenue Code or by any other law at the time being in force. The Mamlatdars' Courts Act is such a law and it confers upon the Collector powers of revision, which within his territorial limits, the Assistant Collector was, we think, empowered to exercise. It cannot, therefore, be said that the order complained of was in law a nullity for this reason.

It was then contended that even if the Assistant Collector had power to revise the proceedings of the Mamlatdar's Court, he exceeded his jurisdiction by admitting fresh documentary evidence, and in that connection we have been referred to another decision of Scott, C. J., and Rao, J., in *Kashiram Mansing* v. *Rajaram*[1] in which those learned Judges have certainly held that the Collector who, while revising the Mamlatdar's decree admits evidence, thereby exceeds his jurisdiction, and that is a sufficient ground to warrant the interference of the High Court in the exercise of its superintending power. Doubtless this is a similar case, but the exercise of this extraordinary power, vested in the High Court, is always a matter of discretion; and having regard to the facts which have been stated here, particularly that litigation is actually in progress and may soon be expected to settle the matters in dispute between the parties we do not feel called upon now to interfere with the revisional order passed by the Assistant Collector. We do not think it necessary to do so to avert any material and otherwise irreparable injustice.

For these reasons we think that the Rule must be discharged with costs.

Rule discharged.

R. R.

(1) (1911) 35 Bom. 487.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

BHATT MULJIBHAI NARBHERAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. PATEL LAKHMIDAS DADABHAI (ORIGINAL PLAINTIFF), RESPONDENT.* 1911. *August 25.*

Suit by a widow to recover possession of her husband's share in divided family lands after partition by metes and bounds—Alleged partition of a house—Dismissal of suit, family lands being found not divided—Subsequent suit by a reversioner to recover possession of the house—No res judicata.

There were two brothers, Kishorbhai and Desaibhai. Kishorbhai died leaving him surviving his widow Bai Kanku, a daughter Bai Divali, and brother Desaibhai. Subsequently Desaibhai died leaving behind him his daughter's son Muljibhai. In 1884 Bai Kanku brought a suit against Muljibhai to recover possession of her husband's share in divided family lands after partition by metes and bounds. She alleged that the house in which she lived had fallen to her husband's share at partition. It was found that the family lands were not divided and the suit was dismissed. Bai Kanku died in 1907. In the year 1908 the plaintiff, who was the nearest heir of Kishorbhai, brought the present suit against Muljibhai to recover possession of the house. A question having arisen as to whether the finding in the suit of 1884 with respect to family lands operated as *res judicata* with respect to the house,

Held, that the decision in the suit of 1884 did not bar the present suit.

SECOND appeal against the decision of D. G. Medhekar, Additional First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of J. N. Bhat, Subordinate Judge of Borsad.

Suit to recover possession of a house.

There were two brothers, Kishorbhai and Desaibhai. Kishorbhai died leaving him surviving his widow Bai Kanku, a daughter Bai Divali and brother Desaibhai. Subsequently Desaibhai died in or about the year 1883 leaving behind his daughter's son Muljibhai. In the year 1884 Bai Kanku and her daughter Bai Divali filed a suit, No. 1151 of 1884, in the Court of the First Class Subordinate Judge of Ahmedabad against Muljibhai to recover possession of her husband's share in family lands after division by metes and bounds. She alleged that at a partition between the two brothers, Kishor-

* Second Appeal No. 542 of 1910.

1911.

MULJIBHAI NARBHERAM v. PATEL LAKHMIDAS.

bhai and Desaibhai, the income of the family lands was divided and that the house in which she lived had fallen to her husband's share. One of the issues raised in that suit was, "Was there a division between Kishorbhai and Desaibhai and was the family land allowed to remain joint on condition that the income should be received according to the respective shares as alleged by the plaintiff?" The finding on the said issue was in the negative and the suit was accordingly dismissed. Bai Kanku having died in the year 1907, the plaintiff, who was the nearest heir of Kishorbhai, brought the present suit against Muljibhai and his tenant in the year 1908 to recover possession of the house alleging that defendant Muljibhai had taken wrongful possession

Defendant 1, Muljibhai, answered *inter alia* that Kishorbhai and Desaibhai were joint and undivided members of a Hindu family, that Kishorbhai having died without any male issue, Desaibhai became the absolute owner of all joint property including the house in suit, that he was the heir of Desaibhai and that the suit was barred by section 13 of the Civil Procedure Code (Act XIV of 1882) by virtue of the finding in Suit No 1151 of 1881.

Defendant 2, who was the tenant of defendant 1, was absent.

The Subordinate Judge found that the question whether there was or was not a division between Kishorbhai and Desaibhai was not *res judicata* by reason of the decision in Suit No. 1151 of 1881 and that the plaintiff was not entitled to claim the house in preference to defendant 1 He, therefore, dismissed the suit.

With respect to the question of *res judicata* the Subordinate Judge observed :—

It will appear from above that though there was allegation in the plaint that there was a division of the dwelling houses and a denial of division by defendant 1 and though the issue as to division was framed in so general a manner as to cover the pleadings both as regards the houses and lands, the finding on the issue was confined expressly to the family land. The Court refrained, and in my opinion intentionally refrained, from deciding the question as to the division of the dwelling houses * * For, the subject-matter before the Court, in that suit was land only * * * A perusal of the whole judgment (exhibit 21) shows that the

Court did not address itself to the question as to the division of the dwelling houses notwithstanding the fact that some of the witnesses have been put questions as regards the division of the houses too (exhibits 90 and 91). It is true that the Court has at one place remarked as follows :—

"I am of opinion that the severance of interests and payment of the share as alleged, are not proved, and that the property has always remained undivided, and Kankuba, who lived in a separate house, was maintained by Desaibhai as a widow of the joint family until his death which took place in Vaisakh Samvat 1939."

But this remark is not tantamount to deciding that there was no division of the family houses. There may be a division of houses between brothers and yet the widow of one of them may be maintained by the other, out of the income of joint family lands, in which case it can be said that the widow was maintained as a widow of the joint family I, therefore, hold that though the question of the division of houses was raised in the pleadings and though a general issue as to division was framed, the question of division of lands only was decided and not of the houses, the same not being necessary for the purposes of that suit.

On appeal by the plaintiff, the appellate Court found that the house in suit was in the possession of Bai Kanku as her husband's separate property The decree of the first Court was, therefore, reversed and the claim was allowed.

Defendant 1 along with his wife, Bai Jhaver, preferred a second appeal.

L. A. Shah for the appellants (defendant 1 and his wife).

Branson with *G K. Parekh* for the respondent (plaintiff).

Beaman, J. :—There were two brothers Kishorbhai and Desaibhai. The plaintiff is admitted to be the nearest heir of Kishorbhai, and the defendant of Desaibhai Kishorbhai left a widow Bai Kanku, who resided in the house, which is the subject-matter of this suit, until her death. The plaintiff's case is that during the life-time of Kishorbhai and Desaibhai they effected a partition of their house property, as a result of which, the house in suit fell to the share of Kishorbhai and became his exclusive property. This was held to be so, as a fact, in the lower appellate Court. But the appellant contends that the present suit is *res judicata* by reason of a suit brought by Bai Kanku in 1884, for her share of the lands, which had constituted part of the joint property of the brothers Kishorbhai and Desaibhai. That point was taken in the Court of

1911.

MELJIBHAI NATHUBHAI v. PATEL LAKHMIDAS.

first instance and elaborately discussed. The learned Judge there came to the conclusion that the suit of 1884 did not bar the present suit; and the present appellant did not raise the point again before the learned Judge of first appeal, so that we have not had the benefit of his opinion upon it.

The appellants' case is that since Bai Kanku sued to recover her deceased husband's share in the landed property, exclusive of the houses, on the footing of Kishorbhai and Desaibhai having separated, and since the decision in that suit was against her, it must be regarded as *res judicata* on the whole question of partition or union. We think, however, after carefully considering all the facts of that suit, and the arguments addressed to us on behalf of the appellants, that this would be carrying the principle of *res judicata* too far. In that suit Bai Kanku asked for possession, after partition by metes and bounds, of her late husband's share in the fields, which had constituted part of the joint family property. She had alleged then, as the plaintiff alleges now, that there had been an actual partition of the house property, to which effect had been given; and though no doubt it is an implication of law that where there is a partition of some part of the property carried out by metes and bounds, the interest of the divided members of the family are severed, they are thenceforward in respect of the property which is not partitioned by metes and bounds tenants-in-common, in practice it is quite usual to find Courts implying reunion from the mere fact of joint use and occupation of the property not actually partitioned for a long period after the alleged partition.

Having regard to what was actually found by the learned Judge who tried Bai Kanku's suit, to the frame of the issues and the carefully guarded language he has used in disposing of them, it appears to us that what is now substantially in issue between the parties did not necessarily then call for decision and was not in fact decided. It is quite true that there are some observations in the judgment in that suit which strongly support the appellants' allegation that had the learned Judge thought it necessary to do so, he would have held definitely

that there never had been actual partition of the house property. But it appears to us that even had he held that the house property had been partitioned, and that each brother had thenceforward held his share in severalty, that need not necessarily have precluded him from coming to the decision he did upon the only question he was asked to decide. What, therefore, was not directly and substantially in issue in that suit and was not necessary to be decided, cannot now, we think, fairly be held to be *res judicata* against the plaintiff.

As this was the only point taken in appeal, we must, therefore, dismiss the appeal with all costs and confirm the decree of the Court below.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

PARWATIBAI KOM BHAGIRATH (ORIGINAL PLAINTIFF), APPELLANT, v. CHATRU LIMBAJI (ORIGINAL DEFENDANT 2), RESPONDENT.*

1911. *August 25.*

Hindu Law—Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose.

Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal

A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere, unless she leaves the house for an improper purpose.

Ambabai kom Balaji Vinayak Kale v *Ramchandra Balaji Kale*[1], followed.

Girianna Murkundi Naik v *Honama*[2], referred to

SECOND appeal against the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree of M. K. Nadershah, Joint Subordinate Judge.

* Second Appeal No. 328 of 1910.

(1) (1895) P. J., p. 44.

(2) (1890) 15 Bom. 236.

1911.

PARWATIBAI v. CHATRU LIMBAJI.

The plaintiff sued to recover from the defendants maintenance at the rate of Rs. 10 per month together with Rs. 480 for arrears of past four years' maintenance. She prayed that her maintenance should be declared a charge on the property in the hands of the defendants and that she should be allowed *a certain portion of a particular house exclusively for her* residence during her life-time The plaintiff alleged that her husband died about six or seven years before suit, that defendant 1 was the brother of her deceased husband and defendant 2 was his son, that they all lived joint and in union and held ancestral property jointly, that the plaintiff lived with the defendants for some time after her husband's death, that the defendants having subsequently driven her away, she went to Poona and lived with her mother who maintained the plaintiff till the year 1908 and was no longer able to do so. The plaintiff, therefore, brought the present suit alleging the accrual of the cause of action on the 22nd October 1901.

Defendant 1 contended that there was no joint ancestral property, that the plaintiff's husband lived separate and carried on his business separately, that the plaintiff had forsaken her husband and lived with her mother at Poona where she carried on some trade and that the plaintiff had no right to claim maintenance

Defendant 2 concurred in the defences raised by defendant 1 and added that he had acquired some property by his personal exertions without any assistance from the family and that he was willing to keep the plaintiff in his house and to maintain her she being his paternal aunt.

The Subordinate Judge found that the family of plaintiff's husband was separate from the defendants, that the property in suit was not joint family property, that house No. 1754 was the only family house kept joint and that the plaintiff was entitled to claim maintenance from the said house at the rate of one rupee per month, the monthly rent of the house being two rupees only, from the date of the suit. He, therefore, passed a decree as follows;

I direct that plaintiff do recover from the defendants maintenance at the rate of Re. (1) one per month from the date of institution of this suit (the maintenance to be a charge on house No. 1754 in the hands of the defendants), together with costs in proportion to the claim awarded. The rest of the plaintiff's claim is rejected with costs. Defendants should bear their own costs.

With respect to the plaintiff's conduct and her claim for arrears of maintenance, the Subordinate Judge made the following observations:

Though Re. 1 may seem to be a small amount, it is clear to the Court that plaintiff does not deserve greater amount for her maintenance. Plaintiff had abandoned her husband and had gone to Poona to live. She falsely charges the defendants of having driven her out of their house after her husband's death. Defendant 2 expressed his willingness to maintain her from the very beginning of the suit. There is no evidence whatever that defendants refused to maintain her. The Court had the opportunity of noting the demeanour of both the plaintiff and the defendant 2, and it seemed to the Court that plaintiff would have been well cared for and maintained by defendant 2. Plaintiff appears to be an instrument in the hands of others and she has been set up by them to harass defendant 2 who happens to acquire some property of his own.

Plaintiff had not asked for maintenance from the defendants, nor had she ever served them with a notice claiming maintenance. Defendants besides had never refused to maintain her, they are ever ready to maintain her. Looking to all the circumstances of the case and seeing that plaintiff had left her husband's protection of her own accord (*vide* exhibit 13), I do not think that plaintiff is entitled to the arrears of four years' maintenance prior to the institution of the suit claimed by her. I, therefore, disallow the plaintiff's claim to past maintenance.

On appeal by the plaintiff, the District Judge confirmed the Subordinate Judge's decree having found that excepting house No. 1754 the other property in the hands of the defendants was their separate property.

The plaintiff preferred a second appeal.

K. H. Kelkar for the appellant (plaintiff):—Both the lower Courts have found that the plaintiff is entitled to maintenance. Her right to maintenance having been established she is entitled to the arrears of maintenance as a matter of law. It was not necessary for her to prove demand and refusal: *Ambabai kom Balaji Vinayak Kale* v. *Ramchandra Balaji Kale*[1].

(1) (1895) P. J., p. 44.

1911.

PARWATIBAI v. CHATRU LIMBAJI.

G. B. Rele for the *respondent* (defendant 2):—Though we hold no property excepting a house which would be liable to the plaintiff's maintenance, still, taking into consideration the plaintiff's relationship, we have always expressed our willingness to maintain her provided she lived with us. *There are* sufficient indications in the Subordinate Judge's judgment showing that the plaintiff is not entitled to any indulgence. Arrears of maintenance can be granted provided the plaintiff has made out a proper case for maintenance. In the present case maintenance has been awarded to the plaintiff because a particular house was found to be joint property and her maintenance has been charged on the house

HAYWARD, J. —The lower Courts have held that the plaintiff is entitled to maintenance at the rate of one rupee a month from the date of suit. They have, however, declined to grant arrears of maintenance for the four years previous to the suit. On second appeal before us the only question argued has been whether the arrears were properly refused in consequence of failure to prove demand and refusal No doubt such a rule was laid down in certain decisions of the Madras High Court, but a contrary view was taken by Ranade, J , in the case of *Ambabai kom Balaji Vinayak Kale* v *Ramchandra Balaji Kale*[1], in this Court The only ground upon which the arrears might in this case have been refused would appear to be that indicated by Sargent, C. J., in the case of *Girianna Murkundi Naik* v. *Honama*[2] where he stated "it is now well established that a Hindu widow is not bound to reside in her deceased husband's family house, and does not forfeit her right to maintenance by going to reside elsewhere, *unless she leaves the house for an improper purpose*." No such ground has, however, been made out in this suit.

We must, therefore, modify the decree by granting the plaintiff four years' arrears of maintenance prior to suit at the rate of one rupee a month with proportionate costs of this appeal.

Decree modified.

G. B. R.

(1) (1895) P. J., p. 44. (2) (1890) 15 Bom. 236.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

PANDURANG BALAJI KHANDKE AND OTHERS (ORIGINAL DEFENDANTS 1, 2 AND 3), APPELLANTS, *v.* DNYANU BIN BALAJI *alias* SHIVAJI GURAV (ORIGINAL PLAINTIFF), RESPONDENT.* 1911 *August 25.*

Property dedicated to an idol—Decree against manager—Execution sale—Purchase by defendant—Suit by succeeding manager to recover possession—Defendant's possession adverse to the idol.

The plaintiff, a manager of a temple, brought a suit in the year 1904 to recover possession of certain endowed property in the possession of the defendant. The defence was that the property was purchased at a Court sale in 1870 in execution of a decree against the then manager and that the defendant's possession was adverse to the idol.

Held, dismissing the suit, that the defendant's possession was adverse to the idol.

Dattagiri v. *Dattatraya*(1), referred to.

SECOND appeal against the decision of V. M. Ferrers, Assistant Judge of Satara with appellate powers, confirming the decree of G. R. Datar, Subordinate Judge of Patan.

The plaintiff sued in the year 1904 to recover possession of the property in suit alleging that it was the endowment property of the idol Shri Nimai Devi, that the plaintiff was entitled to enjoy the same as manager, that his father died on the 5th January 1902 and he then told the defendants to give up possession of the property and that the defendants refused to do so setting up purchase in an execution sale.

Defendants answered that the property belonged to one Balaji Laxman Gurav, whose interest was purchased by Murari Damaji Mule in an auction sale on the 25th March 1870 and the same was subsequently purchased from him by the defendants and that the claim was time-barred.

The Subordinate Judge found that the plaintiff was entitled to recover possession of the property in suit after the death of his father, that the property was subject to the charges for the

* Second Appeal No. 215 of 1910.
(1) (1902) 27 Bom. 363.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.
August 29.

GANGADHAR PARAPPA ALUR (ORIGINAL PLAINTIFF), APPELLANT, v. YELLU KOM VIRASWAMI SHIRAWALE (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Inheritance—Wife—Unchastity during coverture—Condonation by husband—Husband and wife.

Under Hindu Law, a widow is not disqualified from inheriting to her husband on the ground of her unchastity during coverture, if it is condoned by her husband.

Where the husband and wife have lived together, without any open breach of marital relations up to the husband's death, it would be a dangerous principle to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge, Appellate Powers, at Belgaum, confirming the decree passed by V. V. Wagh, Joint Subordinate Judge at Belgaum.

Suit to recover possession of property, which belonged originally to one Viraswami. He died leaving him surviving his widow Yellu (the defendant) and a daughter, Ginnana. The daughter sold the property to the plaintiff who sued to recover possession from Yellu. In answer to the defendant's claim to the property, the plaintiff alleged that she (the defendant) was disqualified from inheriting her husband's property on account of her unchastity during coverture.

The Subordinate Judge found that though the defendant led an incontinent life during coverture, her husband had condoned it: and that she was not thereby incapacitated from inheriting her husband's property. He, therefore, dismissed the suit. This decree was, on appeal, confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

T. R. Desai, for the appellant.

Nilkantha Atmaram, for the respondent.

* Second Appeal No. 483 of 1910.

1911.

GANGADHAR PARAPPA v. YELLU.

BEAMAN, J.:—The only question here was whether the widow was to forfeit her succession to her husband on the score of unchastity. The allegation of the plaintiff was that that unchastity was committed during the husband's life-time, and at his express desire. It is conceded that the husband and wife lived, to all appearances, happily up to the time of the husband's death. In these circumstances it appears to us that the decision arrived at by the lower Courts was perfectly right. We think that it would be a dangerous principle, where the husband and wife have lived together, without any open breach of marital relations up to the husband's death, to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture. That is, speaking for myself, entirely opposed to the general policy of the law in dealing with the relation of husband and wife. We also think that the decisions of the Courts below rest upon very good authority, if we treat them from the point of view of Hindu lawyers. We are, therefore, of opinion that this appeal must be dismissed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

JASUDIN WALAD AMBIR SAHEB FAKI (ORIGINAL PLAINTIFF), APPELLANT, v. SAKHARAM GANESH SHROTRI (ORIGINAL DEFENDANT), RESPONDENT.*

1911. *August 29.*

Contract of sale—Vendor's interest in the property sold ceasing to exist by Government Resolution—Vendor becoming entitled to other interest—Vendee cannot sue to recover the other right—Pre-emption—Personal right—Transfer—Transfer of Property Act (IV of 1882), section 6.

The defendant, who was occupant of certain Survey Numbers, had, under a Government Resolution, a right of pre-emption in stumps of trees standing on the lands, sold the stumps to the plaintiff. After the date of the sale, Government issued another Resolution by which the right of pre-emption was abolished, and the

* Second Appeal No. 571 of 1909.

1911.

JASUDIN v. SAKHARAM GANESH.

occupant was awarded only 50 per cent. of the net proceeds of the sale of the stumps by the Forest Department. This percentage was stated to be "a gift from Government and subject to no tribunal." The plaintiff sued to recover the percentage from the defendant, which the latter received from Government in respect of the stumps sold by him:—

Held, that the plaintiff was not entitled to recover anything from the defendant; for what the plaintiff was claiming was a gift or bonus from Government to the defendant under a Government Resolution, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable.

The right of pre-emption is a purely personal right which cannot be transferred to anyone except the owner of the property affected thereby.

SECOND appeal from the decision of A. W. Varley, Assistant Judge of Thana, reversing the decree passed by G. B. Laghate, Subordinate Judge of Bhiwandi.

The defendant Sakharam was the occupant of certain Survey Numbers in the village of Indgaon in the Vada Taluka. In 1904, he sold to the plaintiff stumps of trees standing on the Survey Numbers at the rate of Rs. 6 per 100 stumps. At the date of the sale, the interest which the defendant had in the stumps was thus stated in a Government Resolution:—

"The Conservator of Forests, Northern Circle, should now arrange to have the teak on all the occupied areas disposed of with the least possible delay. It should in the first instance be offered to the occupants at a valuation, and if the offer is not accepted, it should be cut and removed for sale, or, where such course is deemed preferable, sold on condition of immediate removal."

In 1905, Government rescinded the above Resolution, and promulgated in its place another Resolution, the material portions of which ran as follows:—

"*The Governor in Council sees no sufficient reason for continuing* to occupants the privilege of pre-emption when the right to the after-growth is no longer disposed of with the standing trees but is reserved to Government. So long as the purchase of the trees carried with it the right to all after-growth it was obviously desirable that the occupant of the land should be the purchaser, for otherwise while he held the land, a third person (the auction-purchaser) would be entitled to the trees in it—an arrangement that has in it no benefit to Government or to the occupant. But when the purchase of the trees carries with it no right to the after-growth, the principal reason for refraining from disposing of the trees to the best advantage to Government ceases.

The Forest Department should cut and remove for sale the teak standing in occupied varkas land, or, when such a course is found preferable, should sell it

1911.

JASUDIN v. SAKHARAM GANESH.

standing on condition of immediate removal, and 20 per cent. of the net proceeds of the sale should be paid to the occupant.

The percentage should be a gift from Government and subject to no tribunal, and in case the Collector is unable to settle summarily to his own satisfaction any disputes as to who is the occupant of any particular Survey Number, the percentage share on that number should be credited, not to any of the disputants, but to the Taluka Local Board for expenditure in the village to which the Survey Number belongs."

The plaintiff did not cut the trees after his contract. And when the Resolution of 1905 was published, the Forest Department cut and sold the teak and blackwood trees on the defendant's land and paid him 20 per cent. of the sale proceeds.

In 1907, the plaintiff sued to recover from the defendant the 20 per cent. that he received from Government and in return undertook to pay to him Rs. 220-8-0, being the price of the stumps as per his contract.

The Subordinate Judge awarded the plaintiff's claim, holding that the defendant was the owner or part-owner of the trees and that the sale-deed operated as a present conveyance of the trees.

This decree was on appeal reversed by the Assistant Judge, who dismissed the plaintiff's claim, holding that by his purchase he acquired the defendant's right of pre-emption, that that right was abolished by Government in 1905, and that the plaintiff had no right to the percentage.

The plaintiff appealed to the High Court.

Jayakar, with *G. S. Rao*, for the appellant.

H. C. Coyaji, with *B. V. Vidwans*, for the respondent.

RUSSELL, J.—This case raises a curious and interesting point. The plaintiff Jasudin sued to recover from the defendant Sakharam Ganesh the sum of Rs. 2,350-11-5, which he said was due to him under a contract dated the 21st of July 1904. The terms of the contract are to be found in the receipt, Exhibit 26. In that document it appears that the defendant, who is the occupant of about twenty Survey Numbers in the village Indgaon in the Vada Taluka, agreed to sell teak and blackwood trees in those Survey Numbers to the plaintiff at Rs. 6 per every 100

1911.

JAGODIN v. SAKHARAM GANESH.

stumps. The plaintiff was to pay certain fees and expenses in connection with those trees, etc Rs. 15 was paid by the plaintiff to the defendant as earnest.

At the time when this contract was entered into there was in existence Government Resolution No. 7114, dated the 27th of September 1897, (to which we have referred), whereby, (when the right to the after-growth was no longer disposed of with the standing trees but was reserved to Government), a privilege of pre-emption was granted in respect of such trees to the occupants of the lands on which they were growing. But by a Resolution No 3874, dated the 11th of May 1905, the Government of Bombay modified their said Resolution. This latter Resolution, after reciting that the privilege of pre-emption sanctioned by the previous Resolution had led to large gains being made by brokers and traders, which represented corresponding loss to the Government and the occupants, goes on to say that the Governor in Council sees no sufficient reason for continuing to occupants the privilege of pre-emption when the right to the after-growth is no longer disposed of with the standing trees but is reserved to Government, etc. The Governor in Council accordingly directs that the Forest Department should cut and remove for sale the teak standing in unoccupied varkas land or, when such a course is found preferable, sell it standing on condition of immediate removal, and that 20 per cent of the net proceeds of the sale should be paid to the occupant, which percentage should be a gift from Government and subject to no tribunal, and in case the Collector is unable to settle summarily any disputes as to who is the occupant of any particular Survey Number, the percentage share of that number should be credited not to any of the disputants but to the Taluka Local Board for expenditure in the village to which the Survey Number belongs.

The plaintiff, under his contract abovementioned, claims the above sum, being 20 per cent of the net proceeds of the sale of the trees in question. The defendant contended that the teak and blackwood trees were not his property but the property of Government and that the plaintiff was only entitled to a refund

of the Rs. 15 earnest money, which the defendant brought into Court.

The learned Subordinate Judge passed a decree in favour of the plaintiff for the amount claimed, while the lower appellate Court reversed and dismissed the suit; but directed the earnest money Rs. 15 to be paid to the respondent.

The question we have now to decide, therefore, is: Is the plaintiff entitled to this 20 per cent. being the value of his vendor's right of pre-emption? Mr Jayakar for the appellant-plaintiff argued that he was; and relied on the analogy of section 43 of the Transfer of Property Act. But it appears to us that no analogy can be based on that section, because standing timber, which this contract deals with, by section 3 is not included within immoveable property. Mr. Jayakar further relied upon section 18 of the Specific Relief Act, the material portion of which runs as follows.—"Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—(*a*) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest." But it appears to us that that section is not applicable, because the position of the defendant here was not that of a person having only an imperfect title to the property he contracted to sell: his sole right was a right of pre-emption, which has been defined as "a right in the event of a sale to purchase the property upon agreed terms." (Encyclopædia of English Law.)

What the plaintiff is claiming is a right of pre-emption pure and simple. Whether, as the lower appellate Court held, the defendant could convey the trees seems to us immaterial For under section 6 of the Transfer of Property Act a right of pre-emption cannot be transferred. See clauses (*b*) and (*d*) of that section. We hold a right of pre-emption to be a purely personal right which cannot be transferred to anyone except the owner of the property affected thereby. Thus it has been held that a lessor having the right to re-enter on breach of covenant by his

1911.

Jasolute v. Sakharam Ganesh.

lessee may transfer the reversion, passing with it the right of re-entry, but cannot transfer that right itself: *Vaguran* v. *Rangayyangar*[1]. Similarly a license to enter and take possession of goods cannot be assigned *In re Davis & Co., Ex parte Rawlings*[2]. And a bare license to seize chattels cannot legally be assigned. *Brown* v. *Metropolitan Counties Life Assurance Society*[3].

What the plaintiff is claiming is a gift or bonus from Government to the defendant under Government Resolution No. 3871 above referred to, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable. Consequently the plaintiff is not entitled to recover it but only Rs 15 from the defendant, and we must confirm the decree of the lower appellate Court and dismiss this appeal with costs. There can be no question that if the plaintiff had sued the defendant to recover damages for breach of contract different considerations would have applied.

Decree confirmed.

R. R.

(1) (1891) 15 Mad 125 (2) (1888) 22 Q. B. D. 193.
(3) (1859) 28 L J Q B 236.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr Justice Hayward.

1911. *August 30*

SAYYAD HIAUL HUSSAN KHAN AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v SITARAM BHAU DESHMUKH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

Mahomedan Law—Pre-emption—Survival of the action to executors and administrators on the pre-emptor's death—Personal action—Probate and Administration Act (V of 1881), section 89—Actio personalis moritur cum persona.

The right of pre-emption under Mahomedan Law does not abate at the pre-emptor's death, but survives to his executors and administrators under section 89 of the Probate and Administration Act (V of 1881).

* First Appeal No 144 of 1910.

APPEAL from the decision of S. S. Wagle, First Class Subordinate Judge at Thana.

This was a suit to enforce the right of pre-emption. Before the issues were settled, the pre-emptor (the plaintiff) died; and his heirs were brought on the record. The defendants contended that the right of pre-emption being personal, did not survive to the pre-emptor's heirs on his death The Subordinate Judge agreed with the contention and held that the suit abated on the pre-emptor's death. The plaintiff appealed.

Jinnah, with *P P Khare*, for the appellants.

Kazi Kabiruddin, with *P. B Shingne*, for the respondents.

BEAMAN, J :—This suit was brought by the plaintiff to enforce his right of pre-emption The suit was originally brought by the pre-emptor himself who has since died, and it is, therefore, now being carried on by his heirs and legal representatives The main ground of contention in the first Court upon the preliminary issue, whether the right to sue died with the pre-emptor; and whether the suit abated; was that the pre-emptor was a Shafei and that according to the Mahomedan Law of that sect the right of pre-emption survived.

The first Court recorded the plaintiff's evidence and held that it was insufficient to establish the fact that the deceased pre-emptor was a Shafei. Accordingly the learned Judge below held that the pre-emptor's right died with him and that the suit abated.

In appeal the appellant, while still contending that the pre-emptor belonged to the Shafei sect, takes a further point that under section 89 of the Probate and Administration Act, which is expressly extended to Mahomedans, a right of this kind does not die, but survives to the executors and administrators. Comparing that section with section 268 of the Indian Succession Act, which governs Englishmen, as well as the various peoples of this country, we cannot doubt but that the intention of the legislature in both enactments was to make a large innovation upon the personal law of Englishmen as

1911.

Sayyad Jiaul Husain v. Sitaram Bhau.

expressed in the old maxim *actio personalis moritur cum persona*, as well as necessarily upon the personal law of Mahomedans and Hindus. Since that, in our opinion, is unmistakably the effect of section 89 of the Probate and Administration Act, we think that its operation must be strictly confined to the persons named in it We are, therefore, unable to accede to Mr. Jinnah's contention that the section is capable of being extended so as to include heirs and representatives who are neither executors nor administrators, within the clear definition of those terms contained in the Probate Act.

We see, however, no objection to the course proposed, should the Court adopt this view, namely, that the plaintiffs *be now allowed to take out Letters of Administration with the* least possible delay and that pending doing so, the hearing of this appeal be adjourned

Order accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt , Chief Justice, and Mr Justice Batchelor.

[19]11. [Augu]st 20.

BAGAS UMARJI MIYAJI (ORIGINAL DEFENDANT 5), APPELLANT, v. NATHABHAI UTAMRAM AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 6), RESPONDENTS.*

Limitation Acts (XV of 1877 and IX of 1908), Article 134—Mortgage—Transfer by mortgagee—Rights of the transferee—Redemption—Construction of statute—Legislative exposition.

The plaintiffs sued in the year 1906 to redeem a mortgage effected prior to the year 1854. The representatives-in-title of the mortgagee, claiming to be absolutely entitled, mortgaged the land with possession to A in 1894 and he sold his rights to defendant 5. The suit having been brought more than twelve years after the alienation to A, defendant 5 claimed as against the plaintiffs the interest of a mortgagee by virtue of his adverse possession under Article 134 of the Limitation Act (XV of 1877).

* Appeal No. 46 of 1910 from order.

1911.

BAGAS UMARJI v. NATHABHAI UTAMRAM.

Held, that it was obligatory on the plaintiffs to redeem defendant 5 before they could recover possession of the property.

Yesu Ramji Kalnath v. *Balkrishna Lakshman*[1], *Maluji* v. *Fakirchand*[2] and *Ramchandra* v. *Sheikh Mohidin*[3], followed.

Abhiram Goswami v. *Shyama Charan Nandi*[4] and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*[5], explained.

The alteration in the language of Article 134 of the Limitation Act (IX of 1908) was a legislative recognition of the soundness of the view that the Article was intended to give protection to all transferees for value including mortgagees.

Swift v. *Jewsbury*[6] and *Morgan* v. *London General Omnibus Company*[7], referred to.

APPEAL against an order of remand passed by M. B. Tyabji, District Judge of Broach, against the decree of Karpurram Manmathram, First Class Subordinate Judge

Redemption suit

The lands in dispute originally belonged to one Tuljaram Harkhaji who mortgaged them with possession to Bapuji Anuji in the year 1853. The property remained in the possession of Bapuji Anuji till his death and then it passed into the possession of his representatives, defendants 1-4.

On the 23rd April 1856 Tuljaram's rights in the lands were sold to one Govindram, an ancestor of the plaintiffs.

Bapuji's representatives, defendants 1-4, mortgaged the lands to Achratlal with possession for Rs 1,775 on the 3rd April 1894, and in 1896 they passed a fresh mortgage-deed to Achratlal for Rs. 2,499 including Rs. 1,775 In January 1903 they passed a further mortgage for Rs 281 to Achratlal's sons Ratilal and Shivlal.

On the 16th April 1903 Bagas Umarji Miyaji (defendant 5) purchased the rights of Achratlal's sons in the lands for Rs 2,780 and on the 7th July 1907 he purchased from defendants 1-4 their interest in the lands for Rs. 4,100 which included Rs. 2,780

(1) (1891) 15 Bom. 583.
(2) (1896) 22 Bom 225.
(3) (1899) 23 Bom. 614
(4) (1909) L. R. 36 I. A. 148.
(5) (1911) 38 Cal. 526.
(6) (1874) L. R. 9 Q. B. 301 at p. 312.
(7) (1883) 12 Q. B. D. 201.

1911.

BAGAS UMARJI v. NATHABHAI UTAMRAM.

On the 4th October 1906 the plaintiffs filed the present suit to redeem the mortgage of 1853.

Defendants 1-4, the representatives of Anuji Bapuji, set up the mortgage to Achratlal and the purchase by Bagas Umarji Miyaji

Defendant 5, Bagas Umarji Miyaji, answered that he was a *bona fide* purchaser of the property for Rs. 4,100, that the plaintiffs had no right to sue and that the claim was time-barred.

The Subordinate Judge dismissed the suit holding that it was time-barred

On appeal by the plaintiffs the District Judge found that there was no bar of limitation to the suit and that the plaintiffs should redeem the incumbrances in favour of defendant 5 before they could recover possession. He, therefore, reversed the decree and remanded the case for findings on the following points:—

(1) What sum should the plaintiffs pay before they can recover the property? (2) Which parties are entitled to the amount found due? (3) On what terms should redemption of the property be allowed?

Against the order of remand defendant 5 appealed to the High Court contending *inter alia that the suit was time-barred* The plaintiffs preferred a cross-objection urging that they were not liable to pay anything to defendant 5 as transferee of the mortgage rights of Achratlal.

Branson with *G. K. Parekh* for the appellant (defendant 5).

D. A. Khare for respondents 1-4 (plaintiffs 1-4).

Ratanlal Ranchoddas for respondent 2 (plaintiff 2).

SCOTT, C. J.:—The main facts of the case are that the plaintiff seeks to redeem a mortgage effected prior to 1854. The representatives-in-title of the mortgagee, claiming to be absolutely entitled mortgaged the land with possession to the fifth defendant's predecessor-in-title Achratlal Govandas, in 1894. This suit was filed more than twelve years later and the fifth defendant claims as against the plaintiff the interest

of a mortgagee by virtue of his adverse possession under Article 134 of the Limitation Act. The lower appellate Court has upheld this contention, which is supported by the authority of three judgments of this Court: *Yesu Ramji Kalnath* v. *Balkrishna Lakshman*[1], *Maluji* v. *Fakirchand*[2], and *Ramchandra* v. *Sheikh Mohidin*[3], in all of which a mortgagee from one who professed to hold absolutely was held to be a purchaser for valuable consideration within the meaning of the Article. It is contended for the respondents upon cross-objections that this interpretation of Article 134 is inconsistent with the judgment of the Judicial Committee in *Abhiram Goswami* v. *Shyama Charan Nandi*[4]. In that case their Lordships were considering the applicability of the Article to a person claiming a title by adverse possession under a permanent lease. The distinction between a leasehold and an absolute interest was pointed out and the conclusion arrived at was that their Lordships were unable to give to the Limitation Act the wider interpretation adopted by the High Court at Calcutta and to treat the lessee as a purchaser under Article 134 of the Act of 1877. The purchaser, their Lordships said, must be the purchaser of an absolute title.

The question is whether this expression of opinion should be treated as overruling the Bombay decisions on titles based upon adverse possession of mortgagees.

First, it is necessary to bear in mind the observations of Lord Halsbury in *Quinn* v. *Leathem*[5] that every judgment must be read as applicable to the particular facts proved and assumed to be proved since the generality of the expressions that may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found.

This caution is particularly necessary in the present connection because it appears from the report in *Abhiram Goswami* v. *Shyama Charan Nandi*[4] that none of the cases in which a mortgagee has been treated as a purchaser for value within

(1) (1891) 15 Bom. 583.
(2) (1893) 22 Bom. 225.
(3) (1899) 23 Bom. 614.
(4) (1909) L. R. 36 I. A. 148.
(5) [1901] A. C. 495 at p. 506.

1911.

BAGAS UMARJI v. NATHABHAI UTAMRAM.

the meaning of Article 134 were referred to in argument or in the judgments of the High Court or the Judicial Committee

On the other hand in confirmation of the conclusion arrived at in the Bombay cases we have referred to it is permissible to note the altered wording of Article 134 as it appears in the Limitation Act of 1908 For the words of Article 134 of the Act of 1877 "and afterwards purchased from the trustee or mortgagee for a valuable consideration" are substituted the words "and afterwards transferred by the trustee or mortgagee for a valuable consideration" this we take to be a legislative recognition of the soundness of the view that the Article was intended to give protection to all transferees for value including mortgagees In support of the reference to the later Act as a legislative exposition of the earlier one we may refer to *Swift* v. *Jewsbury*(1) and *Morgan* v. *London General Omnibus Company*(2). It is also material to observe that in the very recent case, *Ishwar Shyam Chand Jiu* v *Ram Kanai Ghose*(3), Lord Macnaghten in delivering the judgment of the Judicial Committee said with reference to the case of *Abhiram Goswami* v *Shyama Charan Nandi*(4), "Whatever might have been the inclination of their opinion if the matter had been *res integra*, it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v *Shyama Charan Nandi*(4). They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation."

In our opinion the cross-objection fails for the above reasons.

We see no cause to interfere with the remand order which is appealed against. We dismiss both the appeal and the cross-objection with costs on the parties respectively preferring them.

Decree confirmed.

G. B. R.

(1) (1874) L. R. 9 Q. B. 301 at p 312.
(2) (1883) 12 Q. B. D. 201.
(3) (1911) 38 Cal 526.
(4) (1909) L. R. 36 I. A 148.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward

CHUNILAL JAMNADAS (ORIGINAL OPPONENT AND DECREE-HOLDER), APPELLANT, *v* BHANUMATI AND ANOTHER (ORIGINAL PETITIONERS AND JUDGMENT-DEBTORS), RESPONDENTS.* 1911. *September 5.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2, explanation (b)(1)—Agriculturist—Grant of a village as service vatan—Construction—Grant of revenue and not of soil—Holders not agriculturists.

Where a Sanad evidencing the grant of a village as service vatan did not go the length of granting anything more than a share of the revenue and provided that in certain cases the grant may be converted into private property, which had not been done, and a question having arisen as to whether the grant was one of soil and whether the holders were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act (XVII of 1879),

Held, that the grant was a grant of a share of the revenue and not a grant of the soil and did not entitle the holders to be considered agriculturists in view of explanation (*b*) to section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

FIRST appeal against the decision of G. V. Saraiya, First Class Subordinate Judge of Ahmedabad, in an execution proceeding, Darkhast No. 286 of 1909.

Chunilal Jamnadas, owner of the firm of Manekchand Gordhan, obtained a decree, No. 299 of 1903, in the Court of the First Class Subordinate Judge of Ahmedabad against Majmudar Haribhai Ranchodrai and Majmudar Dayabhai Madhavrai,

---

* First Appeal No. 209 of 1910.

(1) Section 2, explanation (*b*), of the Dekkhan Agriculturists' Relief Act is as follows:—

2. In construing this Act, unless there is something repugnant in the subject or context, the following rules shall be observed, namely :—

1st.—'Agriculturist' shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

Explanations.—(*a*) * * * * * *

(*b*) An assignee of Government assessment or a mortgagee is not as such an agriculturist within this definition.

1911.

CHUNILAL JAMNADAS v. BHANUMATI.

deceased, represented by his daughters Behen Chandramati and Bhanumati, both minors, by their guardian Jadurai Dolatrai for the recovery of Rs. 12,151-4-1. The decree was dated the 20th November 1903. The defendants held a Sanad, dated the 26th July 1877, under which they were owners in equal shares of a Majmudari vatan consisting of the village of Zinjra and cash allowances payable from the Sub-Treasury at Viramgam. The plaintiff, in the year 1909, presented a Darkhast, No. 286 of 1909, for the execution of the said decree and levied attachment on the defendants' property. Thereupon, Jadurai Dolatrai, the guardian of the minor defendants, applied that the proceedings in execution should be transferred to the Collector inasmuch as the minor defendants were agriculturists, their deceased father's source of income being lands On the plaintiffs' contention that the defendants were not agriculturists because the grant to them was of the royal share of revenue and not of the soil of the village of Zinjra, the Subordinate Judge instituted inquiry and came to the conclusion that the defendants were agriculturists. The Subordinate Judge, however, observed that though under the Sanad the defendants were merely assignees of Government assessment and would not, therefore, be agriculturists within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act, still in support of his conclusion that they were agriculturists, he relied mainly upon the following considerations :—

(1) The second clause in the Sanad gave to the vatandars a privilege, which was not exercised by them, of converting the vatan into private property heritable and transferable in all legal modes.

(2) In the matter of an application by a vatandar to the Collector for a certificate under section 10 of the Pensions Act, the Collector informed the vatandar that no certificate was necessary for the purpose of the intended suit.

(3) Some land in the village was acquired by Government and compensation with respect to trees standing on the land was paid to the vatandars.

1911.

CHUNILAL JAMNADAS v. BHANUMATI.

(2) The Revenue authorities dealt with the vatandars as owners of the soil and not of land revenue only.

The Subordinate Judge, therefore, passed an order that the execution of the decree should be transferred to the Collector.

Chunilal Jamnadas, opponent and decree-holder, appealed.

L. A. Shah for the appellant (opponent and decree-holder).

N. K. Mehta for the respondents (petitioners and defendants).

HAYWARD, J. :—The appellant decree-holder complains that the respondents judgment-debtors have wrongly been held to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act and have wrongly had the execution of the decree against them transferred for execution to the Collector in accordance with the notification of Government under section 320 of the old Civil Procedure Code (Act XIV of 1882), now section 68 of the new Civil Procedure Code (Act V of 1908).

The lower Court held that the respondents were agriculturists because they were holders of certain service inam land and were grantees of the soil and not merely grantees of a share of the revenue upon a true construction of their Sanad, and so were not excepted from the definition of agriculturist by explanation (*b*) to section 2 of the Dekkhan Agriculturists' Relief Act. The lower Court admitted that *primâ facie* the Sanad was a grant not of the soil but of a share of the revenue, but held on a consideration of certain circumstances previous and subsequent to the Sanad that the true construction of the grant was that it was one of the soil.

Now it appears to us that what we must mainly look to is the terms of the Sanad and that the previous and subsequent circumstances are not in this case of any real assistance to us in construing its terms. The main terms of the Sanad are as follows :—

"Whereas certain emoluments are now entered in the Government accounts as the service vatan of the Majmudari—of taluka Viramgam—in the Ahmedabad Collectorate; and whereas the holders of the said vatan have agreed to the annual deduction therefrom as below stated in consideration of Government foregoing the service which they have a right to demand, it is hereby declared that" :—

1911.

CHUNILAL JAMNADAS v. BHANUMATI.

"1st:—The vatan as now confirmed, and below specified, shall be continued subject to certain conditions hereditarily without demand of service, and without any further deduction therefrom on account of service and without objection or question on the part of Government as to the rights of any holders thereof, so long as there shall remain in existence any legal heir to the vatan, whether lineal, collateral or adopted within the limits of the vatandar's family and whether descended in the male or female line."

"2nd:—When all the recorded sharers in the vatan agree to request it, the general privilege of adopting at any time any person out of the vatandar's family who can be legally adopted, and of transferring the vatan or any recognized share thereof, by sale, mortgage, etc., as private property, will be granted by the Government to the vatan on the payment from that time forward, in perpetuity of an annual Nazerana of one anna in each rupee of the total emoluments of the vatan as now confirmed and from the date of the imposition of this Nazerana the whole vatan or the recognized share thereof will be converted into private property heritable and transferable in all legal modes."

Then follows a table showing the name of the vatan to be Majmudari, the amount of land to be the village assessed at Rs. 1,650 of which Rs 825 is deducted in lieu of service and Rs 825 is confirmed as emoluments to the grantees.

Now it appears to us that the first clause of this Sanad clearly does not go the length of granting anything more than a share of the revenue, and this is made clearer by a consideration of the second clause which lays down that in certain circumstances the grant may be converted into private property. It is admitted that no such conversion has taken place If it had, then possibly there might have been room for the argument that the grant had been converted into a grant of the soil.

The distinction between a grant of a share of the revenue and a grant of the soil has been pointed out in the case of *Ramchandra* v. *Venkatrao*[1], where Melvill, J., quoted with approval these remarks in certain other cases of Westropp, C J.: "Sanadi grants in inam...are, generally speaking, more properly described as alienations of the royal share in the produce of land, *i e.*, of land revenue, than grants of land" and again "if words are employed in a grant, which expressly, or by necessary implication, indicate that Government intends that, so far as it may have any ownership in the soil, that ownership may

(1) (1882) 6 Bom. 598 at pp. 602, 603.

pass to the grantee, neither Government nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass. * * * * In the Sanad in evidence here, whosoever framed it, was apparently determined that no ambiguity should exist as to what the force of the term 'village' might be; and, in order to be explicit, he added to the grant of the village in *inam* the words 'including the waters, the trees, the stones, (including quarries), the mines, and the hidden treasures therein'." These remarks were again noticed with approval by Jenkins, C J., in the case of *Rajya* v. *Balkrishna Gangadhar*[1]. We think, therefore, that the grant in this particular case must be held to be a grant of a share of the revenue and not a grant of the soil; and that, therefore, the fact that this village is held by the judgment-debtors does not entitle them to be held to be agriculturists in view of explanation (*b*) to section 2 of the Dekkhan Agriculturists' Relief Act.

We accordingly set aside the order of the lower Court transferring the execution of the decree to the Collector and direct it to dispose of the execution application according to law. Costs of the execution up to date and of this appeal to be borne by the respondents.

Order set aside.

G. B. R.

[1] (1905) 29 Bom. 415.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *September 11.*

SORABJI COOVARJI (ORIGINAL DEFENDANT), APPELLANT, v. KALA RAGHUNATH AND ANOTHER (ORIGINAL PLAINTIFF AND AUCTION PURCHASER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 47, 73, Order XXI, Rule 55—Decree—Execution—Attachment—Application for execution without issuing attachment—Satisfaction of the attaching judgment-creditor's decree by payment into Court—Withdrawal of attachment—Order by Court for rateable distribution and further sale—Order illegal—Money paid into Court for one purpose is not assets liable to rateable distribution—Question in execution—Appeal.

At the instance of two judgment-creditors the immoveable property of the judgment-debtor was attached and his other judgment-creditors merely put in applications for execution without issuing attachment. On the date fixed for the sale of the attached property, that is, on the 22nd September 1909, the decrees of the two attaching judgment-creditors were satisfied by payment of the decretal amounts in Court and the effect was the withdrawal of the attachment under Order XXI, Rule 55 of the Civil Procedure Code (Act V of 1908). On the next day after the payment into Court, an *ex parte* application was made to the Court and, according to the prayer in the application, the Court ordered rateable distribution of the money paid into Court and further sale of the properties which had been attached towards further satisfaction of the claims of the judgment-creditors.

Held, reversing the order, that by virtue of the payment of the 22nd September 1909 the attachment of the property came to an end, and there being no attachment, there could be no order for further sale of the properties. The monies which were paid in to satisfy the attaching creditors' decrees and to raise the attachment could not be treated as assets by the Court and as such distributable among other judgment-creditors who had merely applied for execution.

Vibudhapriya Tirthasuami v. Yusuf Sahib(1), referred to.

Money paid into Court for a particular purpose, as for example, under Order XXI, Rule 55 of the Civil Procedure Code (Act V of 1908), could not be treated as assets distributable under section 73 of the Code. The "assets" referred to in the section were assets held in the process of execution.

The question involved in the appeal was a question in execution between the parties to decrees. Therefore it fell under the provisions of section 47 of the Civil Procedure Code (Act V of 1908) and the order passed by the lower Court was appealable.

SECOND appeal against the decision of G. D. Madgavkar, District Judge of Surat, confirming the order passed by

* Second Appeal No. 694 of 1910.

(1) (1905) 28 Mad. 380.

Naginlal V. Desai, Subordinate Judge of Olpad, in an execution proceeding.

One Sorabji Coovarji was indebted to several creditors. Two of the creditors, namely Kala Raghunath and Bhaga Parabhu, obtained decrees against him and in execution attached his immoveable property. Just about that time thirty-two other creditors, who had obtained decrees against Sorabji Coovarji, applied for execution of their decrees but no attachment was asked for. On the date fixed for the sale of the attached property, that is, on the 22nd September 1909, the decretal amounts of the two attaching judgment-creditors were paid into Court, and the Nazir of the Court passed receipts for the same On the 23rd September 1909 the other decree-holders, whose applications for execution were pending, applied that the amount paid into Court should be treated as assets and should be distributed rateably amongst all the decree-holders. The Court granted the application and directed that the property which already had been attached should be further sold to satisfy the claims of the judgment-creditors.

Against the said order Sorabji Coovarji appealed to the District Court at Surat on the 27th September 1909, and while the appeal was pending his property which had been attached was sold on the 26th January 1910. On the 21st February 1910 he applied that the sale should not be confirmed, but his application was dismissed on the 14th April 1910. Against the said order of dismissal he appealed to the District Court which having confirmed the said order on the 30th June 1910, he preferred a second appeal, No. 694 of 1910.

While the said second appeal was pending in the High Court, the appeal which Sorabji Coovarji had presented to the District Court on the 27th September 1909, was decided by that Court on the 30th June 1911 and the appeal was dismissed.

T. R. Desai for the appellant (defendant).

D. G. Dalvi for the respondents (plaintiff and auction purchaser) :—We take a preliminary objection. The order

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

appealed against being passed under Order XXI, Rules 90 and 92 of the Civil Procedure Code, is not appealable: *Gopi Koeri* v. *Gopi Lal*[1], *Sheodhyan* v. *Bholanath*[2]. The addition of words "or fraud" in Rule 90 shows that the legislature intended to include all similar cases under this Rule

Section 47 of the Civil Procedure Code does not apply. The auction purchaser, who is joined as respondent 2 in the present second appeal, was neither a party to the suit, nor his representative in interest *Maganlal Mulji* v *Doshi Mulji Bhaichand*[3]. Assuming that section 47 applies, we submit that where the legislature provides two remedies, one, a general and another specific, the latter excludes the operation of the former.

T. R. Desai for the appellant (defendant) :—We submit that the order is appealable It falls under section 47 of the Civil Procedure Code and not under Order XXI, Rule 90. No doubt the effect of our application, if granted, will be to set aside the sale, but that itself is not conclusive Rule 90 applies when the sale is sought to be set aside on the ground of fraud or material irregularity and not when the sale is bad as being without jurisdiction and absolutely void. Our contention is that after the tender of money on the 22nd September 1909, the Court had no jurisdiction to proceed with the said two darkhasts Thus the question is between the same judgment-debtor and decree-holder. Therefore section 47 applies and the order is appealable.

Upon the merits of the case we contend that the proceedings in execution after the 22nd September 1909 were without jurisdiction The amounts paid in Court satisfied the decrees of the two attaching creditors and receipts for the amounts were passed by the Nazir. Therefore the Court should have proceeded under Order XXI, Rule 55 of the Civil Procedure Code which put an end to the attachment. Though there was no attachment at the instance of the other decree-holders, and though they were not parties to the decrees under which

(1) (1891) 21 Cal. 799. (2) (1899) 21 All. 311
(3) (1901) 25 Bom. 631 at p. 635.

the attachments were levied, the lower Court treated the amounts deposited in Court as assets for the satisfaction of the claims of all decree-holders, and ordered further sale under the same attachment which was not then in existence. This was wrong. The Court had no jurisdiction to continue the attachment or proceed with the two darkhasts after the amounts recoverable thereunder were paid up. The judgment-debtor was not bound to tender the amounts due to the other decree-holders who had not attached the property. The amounts were tendered specifically for the satisfaction of the decrees of the two attaching creditors. Therefore the amounts could not be treated as assets within the meaning of section 73 of the Civil Procedure Code. The attachment having thus legally come to an end, further sale by the Court without a fresh attachment was bad and could not stand. It has been held by a Full Bench of the Allahabad High Court that a regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees and where there was no such attachment, any sale that might have taken place was not only voidable but *de facto* void: *Mahadeo Dubey* v. *Bhola Nath Dichit*[1]. Such a sale must be set aside without any inquiry as to substantial injury: *Ram Chand* v. *Pitam Mal*[2], *Bakhshi Nand Kishore* v. *Malak Chand*[3]. It may be argued that the first attachment should enure for the benefit of the other decree-holders, but it has been held that the discharge of the judgment-debt of the creditor who had levied attachment, renders the attachment inoperative with respect to all the creditors: *Kunhi Moossa* v. *Makki*[4], *Sorabji Edulji Warden* v. *Govind Ramji*[5].

The term "assets" refers to assets realized by some process in execution.

The fact that the money was paid into Court in satisfaction of the attaching creditors' debts cannot bring it under section 73

(1) (1882) 5 All. 86.
(2) (1888) 10 All. 506.
(3) (1885) 7 All. 289.
(4) (1899) 23 Mad. 478.
(5) (1891) 16 Bom. 91 at p. 109.

1911.

SYMBIT COOVARJI v. KALA RAGHUNATH.

of the Civil Procedure Code: *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*[1].

We, therefore, submit that the proceedings in execution after the 22nd September 1909 were bad in law and should be set aside.

D. G Dalvi for the respondents (plaintiff and auction purchaser).—The subsequent sale was valid and the amount deposited in Court was rightly held to be assets under section 73 of the Code Order XXI, Rule 55, should be read with sections 73 and 64 of the Code Attachment is levied for the benefit of the decree-holder to prevent private alienation before sale so that the interest of a third party should not come in: *Keshory Mohun Roy* v *Mahomed Mujaffar Hossein*[2]. Sale without attachment is a mere irregularity and not a nullity. The earlier rulings of the Allahabad High Court are bad in view of the subsequent decision of the same Court in *Sheodhyan* v *Bholanath*[3] and of the Calcutta High Court in *Kokil Singh* v *Edal Singh*[4]. Order XXI, Rule 55, must be construed with the help of section 13, clause (2) of the General Clauses Act The word "amount" in clause (1) and "decree" in clause (2) of Rule 55 should be construed to mean "amounts" and "decrees". The other thirty-two decree-holders had put in their darkhasts and they were joined with the two attaching decree-holders by the endorsements of the Court on their applications. Unless they were paid the attachment could not be withdrawn Hence the money paid by the judgment-debtor into Court was paid to all the decree-holders and the attachment was continued with the necessary alterations. Respondent 2 was a *boná fide* purchaser who was not aware of the defect in the auction sale and as against such *boná fide* purchaser the sale cannot be set aside unless it was absolutely without jurisdiction: *Guru Prasad Sahu* v. *Mussamat Binda Bibi*[5], *Yellappa* v. *Ramchandra*[6].

(1) (1905) 28 Mad 380.
(2) (1890) 18 Cal. 188.
(3) (1899) 21 All. 311.
(4) (1904) 31 Cal. 385 at p. 391.
(5) (1872) 9 Beng. L. R. 150.
(6) (1896) 21 Bom. 463.

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

We submit that section 73 of the Civil Procedure Code applies. The words "held by Court" in the section are new. The words in the corresponding section 295 of the old Code were "realized by sale or otherwise in execution". The change in the language was intended to bring within the operation of section 73 monies howsoever received: *Sorabji Edulji Warden* v. *Govind Ramji*[1], *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi*[2], *Manilal Umedram* v. *Nanabhai Maneklal*[3].

The words "shall be deemed to be withdrawn" in Order XXI, Rule 55 are a statutory fiction: *Emperor* v. *Kashia Antoo*[4]. The object of the introduction of the fiction was to enable the judgment-debtor, if necessary, to alienate the property by private sale as soon as the money is paid into Court. The object was not to invalidate any subsequent sale without fresh attachment.

Further, no attempt was made to prove substantial injury to the judgment-debtor by the omission to levy fresh attachment. The lower Court has found as a fact that no injury was caused to the judgment-debtor.

SCOTT, C. J.:—This is an appeal by the appellant from a judgment passed by the District Judge with reference to certain execution proceedings against him.

Two creditors had obtained decrees and attached certain immoveable property of the appellant, and other creditors had obtained decrees but had merely put in applications for execution without issuing attachment. The 22nd of September 1909 was the date fixed by the Court for the sale of the attached property, and upon that date a third person, at the instance of the appellant, came to the Court with sufficient monies to satisfy in full the decretal claims of the two attaching creditors. The money was accepted by the Nazir of the Court and a receipt therefor was given to the person making the payment. The payment so made was made according to the provisions

(1) (1891) 16 Bom. 91 at p. 109.
(2) (1881) 7 Cal. 34.
(3) (1903) 28 Bom. 264.
(4) (1907) 10 Bom. L. R. 25.

1911.

SOMAJI GOOVARJI v. KALA RAGHUNATH.

of Order XXI, Rule 55, which says that where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court the attachment shall be deemed to be withdrawn.

Upon this payment being made the appellant considered himself free from any danger, for the moment, of the sale in execution of his immoveable property, but on the following day, the 23rd of September, an *ex parte* application was made to the Court for distribution of the money paid for the purpose of satisfying the claims of the attaching creditors, and it was urged that the money was assets which were distributable rateably among all the creditors who had applied for execution

On the 27th September 1909, the Judge assented to the contention of the applicants and ordered rateable distribution of the monies so paid into Court and sale of further properties which had been attached towards further satisfaction of the claims of the judgment-creditors

Against this order an appeal was preferred to the District Court by the appellant, but long before it came on for hearing the sale of the other properties had taken place The sale was held on the 26th of January 1910

On the 21st of February 1910, the appellant applied that the sale should not be confirmed but his application was dismissed on the 14th of April 1910

From that order of dismissal the appellant appealed to the District Judge who, on the 30th of June 1910, dismissed the appeal.

In June 1911, the appeal against the order of the 27th of September 1909 came on before the District Court, but, as the question of the confirmation of the sale had already been decided by that Court adversely to the appellant, no further proceedings were taken on the appeal against the order of 27th of September, and the appellant comes to this Court in appeal against the order of the 30th of June 1910.

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

It was objected at the outset that this was a case in respect of which no second appeal lay.

We are of opinion, however, that it is a question in execution between the parties to decrees and therefore it falls under the provisions of section 47 of the Code and is appealable to this Court.

The main ground upon which the pleader for the appellant has based his argument is that by virtue of the payment on the 22nd of September 1909 the attachments upon the property must be deemed to be withdrawn, and that if there was no attachment upon the property the Court was not justified in ordering a further sale of the properties, nor was it justified in treating the monies which had been paid in for the purpose of satisfying the attaching creditors' decrees and raising the attachment as assets held by the Court which were distributable among other judgment-creditors who had merely applied for execution

We think that the appellant is right in both contentions. Property can only be brought to sale after it has been duly attached, and if the attachment came to an end upon the payment into Court on the 22nd of September 1909, the property was not duly attached at the time of the sale in January 1910. We think this is clear from the terms of Rule 55, Order XXI; but if further authority is required we may refer to the judgment of the Madras High Court in *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*[1].

The question remains whether the monies paid into Court for a particular purpose can be treated as assets distributable under section 73 of the Code. That section provides that "where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." In the reference to "the costs of

(1) (1905) 28 Mad. 380.

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

realization" we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI, Rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55, for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

For these reasons, we reverse the order of the lower appellate Court, set aside the sale, and remand the darkhast to the lower Court for disposal according to law

The appellant will have his costs in this Court and the two lower Courts.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor.

1911.

September 26

VELCHAND CHHAGANLAL (ORIGINAL PLAINTIFF), APPELLANT, v. A. FLAGG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 74—Loan—Default in payment—Enhanced interest—Interest calculated in anticipation added to principal—Penalty—Relief against penalty.

The defendant received Rs. 2,440 on a bond which he executed for Rs 5,500 in the plaintiff's favour The balance of the amount of the bond was made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. The amount was made re-payable in monthly instalments of Rs 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month. In case of default in payment of any instalment, the whole amount of the bond became due at once; but if the plaintiff waited longer the defendant agreed to pay interest at 5 per cent. per month till payment. There was default in payment; and the plaintiff sued to recover the amount of the bond together with interest at 5 per cent. per month. The Sub-

* First Appeal No. 187 of 1910

1911. VELCHAND v. FLAGG.

ordinate Judge held that the stipulation for addition of interest in anticipation in the amount of the bond as also the stipulation for enhanced interest at the rate of 5 per cent. per month on default were unenforceable at law and awarded the plaintiff's claim for Rs. 2,440 with interest at the rate of 1½ per cent. per month

Held, that both the stipulations were penal and therefore not enforceable in full by reason of the provisions of section 74 of the Indian Contract Act, 1872.

FIRST appeal from the decision of G. V. Saraya, First Class Subordinate Judge at Ahmedabad.

Suit to recover money on a bond.

The bond in question was executed by Lieut. A. Flagg for Rs. 5,500 on the 29th September 1908 to Velchand Chhaganlal. It was signed by Lieut. G. W. Atkins as surety. It ran as follows:—

"Borrowed and received from Chaganlal Panachand, bankers, Nasirabad, the sum of Rs. fifty-five hundred only (Rs. 5,500), which sum we jointly or severally agree to repay the firm or their manager Velchand in Ahmedabad or at their option at Nasirabad or elsewhere in monthly instalments of Rs 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month. Instalments to be given from the 5th November 1908.

If we fail to pay any one instalment on due date as agreed above we jointly or severally promise to pay the whole amount of the bond at once on demand.

But if the firm wait any longer we agree to pay interest at 5 per cent. per month till payment in full."

Under the bond Lieut. A. Flagg received Rs. 2,440 in cash; Rs. 50, the first instalment which had become due then, was treated as paid; and Rs. 3,520 were added as interest calculated on Rs. 6,000 at the rate of 1½ per cent. per month. The amount of the bond was at first fixed at Rs. 6,000; but it was reduced to Rs. 5,500 on the defendant's pledging his life policy with the plaintiff.

The first instalment which became due in November 1908 was taken as paid. There was default in payment of the December instalment. The defendant did not pay any of the remaining instalments in time, though he paid Rs. 886 to the plaintiff in small sums.

The plaintiff filed this suit on the 1st April 1910, to recover the unpaid balance of Rs. 5,500 and claimed interest over it from December 1908 to the date of the suit at the rate of 5 per cent. per mensem.

1911.

VIRCHAND v. FLAGG.

The Subordinate Judge found that the amount actually advanced under the bond was Rs 2,440, which he decreed in plaintiff's favour, with interest at the rate of 1½ per cent. per month He held that both the stipulation for addition of interest in the amount of the bond, and the stipulation to pay further interest at the rate of 5 per cent per month were unenforceable at law.

The plaintiff appealed to the High Court

Coyaji, with *Ratanlal Ranchhoddas*, for the appellant.

The respondents did not appear

The following cases were referred to in the course of argument —*Velchand* v. *Manners*[1], *Hari* v. *Ramji*[2]; *Prayag Kapri* v *Shyam Lal*[3], *Rai Balkishen Dass* v. *Raja Run Bahadoor Singh*[4], and *Kirti Chunder Chatterjee* v *J. J. Atkinson*[5]

SCOTT, C J —The appellants are a firm of money-lenders who through the agency of a firm of commission agents in Bombay advanced to the first respondent a sum of Rs. 2,440 on or about the 14th of October 1908 Prior to that payment an agreement upon a stamped paper of Rs 30 was signed by the first respondent for whose benefit the payment was made By that agreement he stated that he had received from the appellants Rs 5,500 which he and the second defendant, who was then intended to sign as a surety, agreed to repay in Ahmedabad or at the option of the appellants in Nasirabad or elsewhere in monthly instalment of Rs. 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month, the instalments to begin from 5th November 1908. And it was stipulated in two subsequent clauses as follows:—"If we fail to pay any one instalment on due date as agreed above we jointly or severally promise to pay the whole amount of the bond at once on demand. But if the firm waits longer we agree to pay interest at 5 per cent. per month till payment in full."

(1) (1909) 25 T.L. R 329.
(2) (1904) 28 Bom. 371.
(3) (1903) 31 Cal. 133.
(4) (1883) L. R. 10 I. A 162.
(5) (1906) 10 C. W. N. 640.

The second respondent signed the agreement as surety on the 14th of October 1908, the date upon which the payment of Rs. 2,440 was made.

It is noted by the learned Subordinate Judge that the balance of Rs. 5,500 is made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. That would make a rate of interest exceeding 3 per cent. per mensem upon the original advance. At the time of the suit the 39 months' period had not expired, for the suit was filed upon the 13th of April 1910. But the plaintiffs alleged a cause of action by reason of the failure of the respondents to pay due instalments after demand made. That cause of action arises under the first stipulation which we have referred to. The plaintiffs base a claim for interest at 5 per cent. per month upon the second of the stipulations referred to.

The learned Subordinate Judge has come to the conclusion that both these stipulations upon which the claim in the suit is based are penal and therefore not enforceable in full by reason of the provisions of section 74 of the Indian Contract Act, and he refers to illustration (*g*) to that section as showing that this is a case to which section 74 is directly applicable. That illustration runs as follows :—" A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty." Again, the stipulation whereby interest at 5 per cent. per month is payable upon the sum due is a stipulation for increased interest from the date of default which, as the explanation of the section shows, may be a stipulation by way of penalty. In the present case it is a stipulation to pay 60 per cent. interest upon a sum which is originally made up very largely of interest at an exorbitant rate. We have, therefore, no hesitation in holding that the second stipulation also is one by way of penalty.

Various money-lenders' cases have been cited to us decided by the Indian Courts and one decided by Mr. Justice Darling in

1911.

VELCHAND v. FLAGG.

the King's Bench Division in England. The English case appears of considerable similarity to the present one and the plaintiffs were the same in both cases suing upon agreements in very much the same form. It is to be observed, however, that the provisions of section 74 and its illustration (*g*) were not brought to the notice of the learned Judge. Similarly in the Indian cases section 74, as amended by Act VI of 1899, does not seem to have been brought to the notice of the Court in argument.

We are of opinion that the learned Subordinate Judge has rightly decided this case. He has allowed one-and-a-half per cent. per mensem, that is, interest at 18 per cent. upon the amount actually due in respect of sums advanced This we have no doubt is reasonable compensation.

We affirm the decree and dismiss the appeal.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

ABDUL REHMAN BAPUSAHEB AND OTHERS (PLAINTIFFS) *v.* CASSUM EBRAHIM AND OTHERS (DEFENDANTS).*

1911

June 20

Civil Procedure Code (Act V of 1908), section 92—Sanction of Advocate-General—Plaint amended—New defendant and prayers added—No sanction of Advocate-General to amendments.

Two plaintiffs as relators, having previously obtained the sanction of the Advocate-General under section 92 of the Civil Procedure Code, filed a suit against three defendants in respect of certain charitable properties. When the suit was called on for hearing two of the defendants were struck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint and prayed for certain reliefs against the added defendant. No sanction

* Suit No. 450 of 1909.

of the Advocate-General was obtained previous to the amendment of the plaint and the addition of the new defendant.

Held, that the plaintiffs were not entitled to maintain the suit against the added defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint.

Attorney-General v. Fellows[1] followed.

THE facts of this case appear from the judgment.

Strangman, Advocate-General, with *Jafferbhai* for the plaintiffs.

Mirza and *Khan* for defendants.

DAVAR, J.—On the 15th of June 1909, the two plaintiffs filed this suit against three defendants, Mahomedali Ebrahim, Cassum Ebrahim and Cawasji Motabhai, alleging that the property in the plaint mentioned was religious charitable property, that the first two defendants had arranged to mortgage the said property to the third defendant pursuant to an order obtained from the Court and got from him Rs. 500 as earnest money, that though the intended mortgage fell through the third defendant had obtained a collusive decree against the first two defendants and that the third defendant had attached the said charitable property and was about to have the same sold.

They prayed for a scheme, for a declaration that the order authorizing the mortgage was null and void and might be set aside, for an order restraining the sale, for accounts, and for further and other relief.

Pending suit the first defendant died. The suit was called on for hearing before me on the 15th of August last when his name was ordered to be struck off. The second defendant did not appear and the third defendant agreed to remove his attachment and pay certain costs and went out of the suit. It was then stated to me that one Abdul Rehman *bin* Ahmed claimed to be the owner of the property and it was necessary to add him as a party defendant and proceed with the suit against him. The plaintiffs applied for leave to add him as a

[1] (1820) 1 J. & W. 254.

1911.

ABDUL REHMAN v. CASSUM EBRAHIM.

defendant and to amend their plaint. Their application was acceded to and the suit stood over.

The plaintiffs before the institution of the suit had obtained the sanction of the Advocate-General under section 92 of of the Civil Procedure Code and such sanction is endorsed at the foot of the plaint and bears the same date as the day on which the plaint was admitted.

Pursuant to the order of the 15th of August 1910 the plaint was amended on the 4th of October 1910. Mahomedali Ebrahim's name was struck off. Cassum Ebrahim became the first defendant, Cowasji Motabhai became the second defendant, and Abdul Rehman was added as the third defendant. In the body of the plaint the plaintiffs added two paragraphs and three prayers In the added paragraphs they allege that *after* the filing of this suit the third defendant had taken forcible possession of the said charitable property, got the same transferred to his name in the Collector's books, and had been since then in possession recovering the rents and profits thereof and appropriating the same to his own use.

The added prayers ask that the third defendant may be ordered to hand over possession of the property to the trustees to be appointed by the Court, that it may be declared that he is not a fit and proper person to be the *Mujavar* of the Durgah, and that pending suit a Receiver may be appointed to take charge of the property No sanction was obtained from the Advocate-General previous to the amendment of the plaint. In his written statement the third defendant contends that so far as he is concerned, this suit is bad, as the consent of the Advocate-General was not obtained to the institution of this suit as against him.

When the suit was called on for further hearing before me on the 15th instant, the first defendant appeared in person and stated that he did not wish to contest the suit. The case against the second defendant had been dealt with and he went out of the suit on the 15th of August 1910 and did not

appear at the adjourned hearing. The third defendant appeared by counsel and the first issue raised by the learned counsel on his behalf is "whether the plaintiffs can maintain this suit as against the third defendant Abdul Rehman." This issue was argued as a preliminary issue and I reserved judgment.

It is conceded that this is a suit which falls within the provisions of section 92 and the plaintiffs could not have instituted the same without the sanction of the Advocate-General. The only question raised by the learned Advocate-General was whether any further sanction was necessary previous to the amendment of the plaint and the addition of a new defendant. He also contended that the third defendant had waived the objection if valid, and put in certain correspondence previous to the amendment in support of his contention.

As to the first point, if we turn in the first instance to the English practice, it is quite clear that the previous sanction of the Attorney General is necessary before an amendment could be made in an action instituted by relators in respect of public charitable properties.

In *Attorney-General* v. *The Ironmongers' Company*(1) it was held that a relator's action is the action of the Attorney General, the Master of the Rolls at the end of the case remarking that he did not know anything more important to the general interest of charities and of the public so far as it was interested in charities, than that the authority and discretion of the Attorney General in all these proceedings should be maintained perfectly unbroken, unfettered and unbiassed.

In *Attorney-General* v. *Fellows*(2), the Lord Chancellor said that an amendment could not be permitted without the sanction of the Attorney General. If it were, the whole information except the introduction might be changed. The order in that case was to take the information off the file with costs.

The Indian authorities seem to point the same way. The object of providing that in charity suits the previous sanction

(1) (1840) 2 Beav. 313. (2) (1820) 1 J. & W. 254.

1911.

ABDUL REHMAN v. CASSUM EBRAHIM.

of the Advocate-General should be a condition precedent to the institution of the suit is to save trustees from harassing and vexatious actions at the instance of irresponsible parties. The Advocate-General considers the facts placed before him and if he finds that the proposed suit is a necessary or a proper one, he sanctions the same If after he has exercised his discretion and authorized a suit of a particular nature, praying for particular specified reliefs against particular parties, the relators are permitted to change the nature of the suit and pray for reliefs not contemplated at the time of the institution of the suit and that against parties other than parties against whom the Advocate-General has sanctioned the suit, the safeguard provided by section 92 of the Civil Procedure Code would be wholly defeated and the effect of the section would be practically nugatory.

In *Sayad Hussein Miyan* v *Collector of Kaira*[1], a Division Bench of our Court held that when sanction was given to the institution of a suit under section 539 of the Code of Civil Procedure, Act XIV of 1882, which section with some alterations corresponds with section 92 of the present Code, the suit must be limited to matters included in the sanction The learned Judges held that it was not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the terms of the sanction

That the sanction of the Advocate-General is a condition precedent to the institution of the suit is very clear from the wording of the section itself and if any authority is needed for this, it is furnished by the decision of the Allahabad High Court in *Gopal Dei* v. *Kanno Dei*[2].

If it is a condition precedent to the institution of the suit, it is quite clear that it is equally a condition precedent to the amendment of the plaint, more especially if by the amendment other party or parties are added to the suit and other reliefs are claimed against such added parties.

On the 15th of June 1909 the Advocate-General gave his sanction to the institution of "this suit" which was the suit as

(1) (1895) 21 Bom 257.

(2) (1903) 26 All. 162.

it was framed then. The amendment refers to a cause of action which arose *after* the institution of the suit and the reliefs claimed against the third defendant are quite distinct from the reliefs claimed originally against the other defendants. The Advocate-General had no opportunity of considering the case against the third defendant. He has sanctioned no suit against him. Though the third defendant is distinctly and specifically referred to in paras 2 and 4 of the plaint as it was originally framed, the plaintiffs left him out of the suit. It was only when his solicitors wrote and claimed that his client ought to be made party to the suit that the plaintiffs consented to add him as a party defendant. I see nothing in the correspondence that could possibly lead me to hold that the third defendant has at any time waived his objection which he has formulated in his written statement.

I hold on the first issue that the plaintiffs are not entitled to maintain this suit as against the third defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint

The suit as against him must be dismissed and the plaintiffs will pay all his costs, including costs reserved.

Suit dismissed.

Attorneys for the plaintiff: *Messrs Jamsetji, Rustamji & Devidas.*

Attorneys for the defendant: *Messrs Edgelow, Gulabchand, Wadia & Co.*; and *Mirza, Mirza & Mangaldas.*

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.
August 30.

MAHARANA RANMALSINGJI BHAGWATSINGJI THAKORESAHEB (ORIGINAL DEFENDANT 1), APPELLANT, *v.* BHATT MAHASHANKAR NILKANTH (ORIGINAL PLAINTIFF), RESPONDENT, AND, BHATT MAHASHANKAR NILKANTH (ORIGINAL PLAINTIFF), APPELLANT, *v.* MAHARANA RANMALSINGJI BHAGWATSINGJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (XV of 1877), article 144—Summary cess—Interest in immoveable property.

The right to levy Summary cess, whether it originated in agreement or in unlawful exaction, is an interest in immoveable property and is governed by twelve years' limitation under Article 144 of the Limitation Act (XV of 1877).

CROSS-SECOND Appeals against the decrees of Dayaram Gidumal, District Judge of Ahmedabad, in appeals Nos. 209 and 211 of 1907, confirming the decree of K. Barlee, Assistant Judge, in Original Suit No. 1 of 1904.

Suit to recover damages for levies alleged to be unauthorized.

The plaintiff was the holder of certain alienated land (Bárkhali) in the village of Javraj in the Sanand and Koth estate in the Ahmedabad District. The estate was administered by the Tálukdári Settlement Officer, Bhimbhai, on behalf of the Thakore of the said estate. On the 11th March 1903 the said Tálukdári Settlement Officer issued notices to the plaintiff requiring him not to remove the crops from his fields until he had paid the Summary, Salami and Local Fund cesses due on his lands. Subsequently on the 5th May 1903 another notice was given to the plaintiff by the Deputy Manager of the Sanand and Koth estate, the said Tálukdári Settlement Officer being on leave, and to enforce payment certain quantity of wheat was attached, but the attachment was removed on the 27th June 1903. Subsequently, on the return of Bhimbhai from leave, he issued a notice to the plaintiff and attached from plaintiff some silver anklets weighing 183 tolas and put them up for auction.

* Cross-Second Appeals Nos. 627 and 900 of 1909.

The plaintiff, therefore, brought the present suit on the 4th January 1901 against the Tálukdári Settlement Officer, Bhimbhai, praying for (1) a decree against the defendant for Rs. 25 damages due to illegal attachment of the wheat, (2) the return of the anklets illegally attached, and (3) perpetual injunction against the defendant restraining him from selling the silver anklets

A temporary injunction was granted to prevent the sale of the anklets. The injunction was, however, withdrawn by an order, dated the 26th February 1901, of the District Judge of Ahmedabad, who directed that the Thakore of Sanand and Koth should be joined as a co-defendant. Afterwards Bhimbhai died and his successor in the Tálukdári Settlement Office was brought on the record

The defences raised were, *inter alia*, that the Thakore had a prescriptive right to levy the cesses complained of inasmuch as the Salami had been levied for over 100 years, the Summary cess was levied, though not under the provisions of the Summary Settlement Act, for 35 years, and the Local Fund for 30 years, that the notices served on the plaintiff were legal and the plaintiff was not entitled to any damages, that the plaintiff was liable to pay to the Thakore of Sanand and Koth annually Rs. 75-0-7, that is Rs 27-3-0 as Summary, Rs. 34-9-11 as Salami and Rs 13-3-8 as Local Fund, that the anklets having been sold for the satisfaction of the cesses due by the plaintiff, he was not entitled to their restoration or their value, that the suit was barred by sections 4, 6 and 11 of the Land Revenue *Jurisdiction Act (X of 1876)* and that the suit against the Tálukdári Settlement Officer was not maintainable.

The Assistant Judge found that the lands in suit were exempt from payment of Summary cess but not from payment of Salami and Local Fund, that the notices served upon the plaintiff were legal with respect to Salami and Local Fund and illegal with respect to Summary cess, that the plaintiff was not entitled to recover damages from the Tálukdári Settlement Officer and he could not recover Rs. 100 for the value of the anklets, that the suit as against the Tálukdári Settlement

1911.

RANMALSINGJI v. MAHASHANKAR.

Officer, defendant 2, was barred by section 6 of Act X of 1876 but not by section 4, that the plaintiff was entitled to the sum illegally recovered from him on account of Summary only and that the plaintiff and his predecessors in title paid Salami before 1869. The Assistant Judge, therefore, decreed that the plaintiff should recover from defendant 1, Thakore of Sanand and Koth, Rs. 27-3-0 on account of Summary. The suit as against defendant 2, the Tálukdári Settlement Officer, was dismissed With respect to the Summary cess the Assistant Judge remarked —

I now come to the question of the *Summary cess. The defendant has admitted* that this is not levied under the Summary Settlement Act, but was levied in A.D. 1869 in accordance with the ancient rights of the Darbar He bases his claim on prescription. This claim in my opinion cannot stand No evidence has been brought to show that a Gujarát Tálukdár has the Sovereign right of imposing taxes. This cess then was illegal in its origin, and following *4 Bombay 79* I hold that it is impossible therefore for the defendant to acquire a prescriptive right to levy it.

The defendants and the plaintiff presented separate appeals, Nos 209 and 211 of 1907 respectively, to the District Court which dismissed both the appeals observing —

In the written statement the defendant said the "Summary" was levied by prescriptive right There is no Gujaráti word like "Summary" and it is clear that a cess was levied by the Darbar after Bombay Act III of 1867 came into force.

The Darbar was a Tálukdár and was not liable to pay the Summary cess. *It is* not shown to have been a part of the quit-rent leviable like the old Salami, and the observations at page 248 of I. L. R. VI Bom. 244 apply.

No prescriptive right *is proved* (*vide* 8 Bom. H. C. R 166; also I. L R. 8 Bom 898, 14 Bom. 526, 4 Bom. 79).

Defendant 1 and the plaintiff preferred Cross-Second Appeals, Nos. 872 and 900 of 1909, respectively.

Defendant 1 in his second appeal, No 872 of 1909, urged *inter alia* that (1) the lower Court erred in holding that the lands held by the plaintiff were exempt from the payment of the cess styled 'Summary' to the appellant, (2) the lower Court ought to have held that where nothing was proved to show a limitation of the Tálukdár's right to enhance or impose a cess by the terms of the grant, he had every right to levy

any cess within the limits of the village Dharo, (3) the lower Court erred in holding that the appellant had not acquired the right to levy the Summary cess and (4) the lower Court ought to have held that the plaintiff was estopped from questioning the appellant's right to levy the cess in dispute when on his own admissions he had paid the same without protest for more than 20 years.

L. A. Shah for the plaintiff (respondent in S. A. 827 and appellant in S. A. 900).

B. J. Desai with *N. K Mehta* for defendant 1 (appellant in S. A. 827 and respondent in S. A. 900).

BEAMAN, J. :—This suit was brought by the plaintiff against the Tálukdári Settlement Officer of that time, Mr. Bhimbhai, to recover damages for certain alleged wrongful acts performed by the defendant in the recovery of certain cesses, which he alleged to be due from the plaintiff.

Before the suit had proceeded far, it appears that the Tálukdári Settlement Officer, through his pleader, applied that the Thakore of Sanand and Koth, whose agent he (the Tálukdári Settlement Officer) was in these proceedings, should be joined as a necessary party. The Assistant Judge of Ahmedabad raised a preliminary issue and held that the Thakore of Sanand and Koth was a necessary party to the proceedings. He was accordingly joined; but no amendment appears to have been made of the plaint and no further relief claimed against the Thakore, who then stood on the record as the second defendant.

During the pendency of the litigation Mr. Bhimbhai died. His successor in the office of the Tálukdári Settlement Officer was then put upon the record in his place. It is to be observed in connection with this brief history of this case that the results have been a little startling and we think a little irregular.

The suit against the original defendant was in form a purely personal action; but the District Judge was of opinion that

before the defendant's liability for damage, in respect of the acts complained of, could be made out, certain questions would have to be investigated in which the Thakore of Sanand had an interest These questions broadly were,—Whether the Thakore of Sanand was entitled to levy three cesses called Salami, Summary and Local Fund upon the lands of the plaintiff Still it is to be borne in mind that the reliefs actually prayed for by the plaintiff were exclusively reliefs against the original defendant No 1 personally He had asked for damages and for an injunction restraining the said defendant No 1, Mr Bhimbhai, from selling some anklets which had been attached for failure to pay the Darbar demands

It is quite clear, I think, that this being a personal action, no liability could have descended from Mr Bhimbhai to his successor in the Tálukdári Settlement Office on the pleadings as originally framed, and never since so far as we could ascertain, amended Still less apparently, could any relief have been obtained upon those pleadings against the second defendant, now appearing on the record as the first defendant, the Thakore of Sanand No relief was asked for against him, and it certainly appears strange that the result of this litigation should have been to award the plaintiff a relief against the defendant No 1 (appellant) which he (the plaintiff) had never asked for

Going, however, a little more closely into what was probably intended in the Courts below, it appears to us that when the Thakore of Sanand was added as a party the Courts contemplated the claim for damages against the original defendant, Mr. Bhimbhai, being extended, so far as the liability could be shown in him, to the Thakore of Sanand When we look to the frame of the issues we can entertain no doubt that before the case was tried the Thakore of Sanand was in full possession of the plaintiff's substantial contention against him that these levies by his agent, the Tálukdári Settlement Officer, were unauthorized. We do not think, therefore, that the Thakore was in any way prejudiced by the somewhat unusual course of procedure adopted in the Courts below.

On the issue which he was interested in contesting, he appears to have had full opportunity of laying before the Court all the evidence upon which he relied. We have been much impressed with the argument that since this issue was merely incidental to the substantial claim for damages, which was personal in the first instance at least to the defendant Bhimbhai, the Thakore of Sanand has not had that full opportunity, to which he was entitled, of having the question whether over the whole of his estate levies of this kind are or are not authorized fully investigated and answered. We should have been disposed to give more weight to that contention had we not come to the conclusion, after giving our best attention to the elaborate arguments addressed to us on both sides, that the Courts below have come to a wrong decision and that the appellant is entitled to succeed here: so that whatever irregularities are to be detected in the procedure of the Courts below, these irregularities could only have been insisted upon as prejudicing the appellant, and since the appellant has succeeded here, we need not, we think, dwell further upon them.

There is this, however, to be pointed out that the Courts below, while decreeing part of the plaintiff's claim against the Thakore, whose estate is still under management, dismissed the suit altogether, as indeed we think they were clearly bound to do, against the Tálukdári Settlement Officer, who had been substituted merely in his official capacity for his predecessor upon whom the tort was charged.

Had the decisions of the Courts below been confirmed, it is easy to see, the difficulties might have arisen, as a result of their thus dismissing the suit against the official manager of the Thakor's estate, while decreeing a part of it at least against that estate still under management.

We come now to consider the substantial question in issue between the parties. The Courts below have found that the two out of the three contested levies were authorized; and although there has been a cross-appeal, Mr. Shah has conceded that if we are of opinion that the third of these levies is also

1911.

RANMALSINGJI v. MAHASHANKAR.

authorized, it would be taking up our time unprofitably to press his cross-appeal in respect of the former two. We may, therefore, confine our attention exclusively to the levy of Summary, which the Courts below found to have been unauthorized and in respect of which they allowed the plaintiff damages against the appellant

The facts are not in dispute The levy originated in the year 1869, so that its origin is not in doubt or uncertainty. Since then it has been paid uninterruptedly and without dispute by the present plaintiff But the Courts below found that the Thakore of Sanand could fall back upon no prescriptive right to continue a levy which was in its origin unauthorized. That is the sole ground of their decision Avoiding as far as possible the use of a word of so ambiguous a connotation as "prescription" or "prescriptive," we think that this case falls to be decided under the terms of the Indian Statute of Limitations

First we are to consider whether a levy of this kind is an interest in immoveable property, within the meaning of Articles 142 and 144 of the second Schedule of the Limitation Act. Being a Summary (cess), where it is levied in the Regulation Districts, there could be no doubt or uncertainty as to its true meaning Where the Summary Settlement was introduced, we shall be speaking now very broadly, the object was to ascertain what persons were entitled to hold their lands free from payment of assessment Where persons so claiming were able to establish complete titles no difficulty arose; but where the titles although alleged were not clear, those claiming under them were unable to establish them in their completeness, the Summary Settlement allowed them to commute for the payment of assessment in full, upon the basis of their really having had some title, though its precise nature was unascertainable, by the payment of what is called Summary (cess). If that had been the procedure followed in the Tálukdári estate of Sanand, then we think there can be no question but that such a commutation in lieu of payment of full assessment would have been such an interest in immoveable property, as

for example the Tora Giras Haks. The Tora Giras Haks, which were not more than a money commutation for black-mail, formerly levied on certain villages, have been held by the Privy Council to be an interest in immoveable property. So, we think, that the payments under the Summary Settlement fall under the same principle and are governed by that decision. It is alleged, however, on behalf of the defendant that nothing of the kind occurred in Sanand. Seeing, however, that the levy of this cess almost synchronized with the introduction of the Summary Settlement in the Regulation Districts and that its name is clearly borrowed from that Settlement, we entertain no doubt but that the Darbar of Sanand levied or intended to levy it upon the same principles. If so, it is referable in reality to an agreement between the parties, and if that were found as a fact, then there would be no need to go further and rely upon the law of limitation. If on the other hand the Darbar, without any preliminary inquiry or agreement, and against the wishes of its subjects, imposed this new cess as merely unauthorized exaction, it appears to us that its position for the purposes of limitation would be still stronger; and this is what the plaintiff-respondent alleges actually occurred

Now the exaction of a cess of this kind, the incidence of which is upon real property and in no sense upon the person for the time being in possession of it, appears to us to be beyond all doubt an interest in the immoveable property, both within the numerous definitions of that term to be found in our various statutes, and under the principles of the decision of the Privy Council upon the Tora Giras case.

Since then this interest in immoveable property, whether it originated in agreement or in unlawful exaction, has been enjoyed by the defendant-appellant for more than forty years, uninterruptedly before suit, we are entirely unable to see how the provisions of Article 144 of the second Schedule of the Limitation Act are to be evaded. We think that there can be no question that if we are correct in holding that this levy is an interest in land, the uninterrupted receipt and enjoyment of

1911.

RANMAL-SINGJI v. MAHA-SHANKAR.

it by the defendant-appellant must be adverse, in the fulles sense of that Article, to the plaintiff-respondent. For if is an interest in land, then the enjoyment of it by the perso claiming it, whether that enjoyment took the form of t commuted money payment or goes the length of actual enj ment of so much of the immoveable property, seems to us make no difference for the purposes of limitation and is each case plainly adverse to the person owning the remair interest in that immoveable property

In this view the case becomes one of great simpli Since, as we said, the enjoyment of the Darbar has adverse for considerably more than the statutory perio beyond all question to within not less than twelve years o suit, the right upon which the plaintiff founds his against the Darbar is, in our opinion, incontrovertibly barred, and the plaintiff's claim for damages founded alleged invasion of this right must be rejected, so far defendant-appellant is concerned We therefore thir the decision of the lower appellate Court was wrong an the plaintiff's suit must now be dismissed against the appellant, as it has already been dismissed against the defendant, the Tálukdári Settlement Officer, with The Cross-Second Appeal No 900 of 1909 is dismiss costs Also Second Appeal No 898 of 1909 is dismis costs.

Appeals dis

G. B.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1911. *September 5.*

DEVIDAS VALAD DHANJI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VITHALDAS KASHIDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 39, 48†—Conciliation—Time taken up in conciliation proceedings—Exclusion of time—Limitation.

The plaintiff sued on a promissory note dated the 12th of June 1905. He first applied on the 23rd May 1903 for a conciliator's certificate under section 39 of the Dekkhan Agriculturists' Relief Act, 1879; and obtained it on the 31st August 1903. Then on the 10th September 1903, both he and the defendant made a joint application for conciliation. The conciliator held that the first certificate that he had granted had become useless; and gave a fresh certificate on the 3rd December 1903. The suit was brought on the 11th December 1903. It was contended that the suit was barred by limitation

Held, that the suit was within time, inasmuch as the whole proceeding from the 23rd of May 1908 to the 3rd of December 1903, was one and continuous, and that period should be excluded under section 48 of the Act.

SECOND appeal from the decision of J. Scotson, Assistant Judge of Khándesh, reversing the decree passed by S. R. Koppikar, Subordinate Judge, at Nandurbár.

---

* Second Appeal No 748 of 1910.

† Sections 39 and 48 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) run as follows :—

39. When any dispute arises as to, or there is a prospect of litigation regarding, any matter within the cognizance of a Civil Court between two or more parties one of whom is an agriculturist residing within any local area for which a Conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply to such Conciliator to effect an amicable settlement between them.

Matters which may be brought before Conciliator

48. In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under section 39 and the grant of the certificate under section 46 shall be excluded.

Allowance to be made in period of limitation.

1911.

DEVIDAS v. VITHALDAS.

This was a suit to recover a sum of money due on a promissory note dated the 12th June 1905. The plaintiff first applied on the 23rd May 1908 to obtain a conciliator's certificate under section 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and obtained it on the 31st August 1908. Then on the 10th September 1908, both he and the defendant made a joint application for conciliation. The conciliator rescinded the first certificate; and granted a fresh certificate on the 3rd December 1908. The suit was filed on the 11th December 1908.

The defendant contended (*inter alia*) that the suit was barred by limitation

The Subordinate Judge dismissed the suit on the ground that it was barred by limitation. On appeal, however, the Assistant Judge held the claim to be within time and decreed it.

The defendant appealed to the High Court.

R. R Desai, for the appellants

N. V Gokhale, for the respondent.

CHANDAVARKAR, J.—The facts are these The suit was brought on a promissory note dated the 12th of June, 1905, and it was presented to the Court on the 11th of December, 1908 On the face of it, therefore, the suit was barred; but the plaintiff seeks to bring it within the period of limitation on the ground that on the 23rd of May he had applied for a conciliator's certificate under section 39 of the Dekkhan Agriculturists' Relief Act. That certificate was granted to him on the 31st of August 1908. But it appears that on the 10th of September, 1908, both he and the defendant made a joint application on the strength of a *kabulayat* executed by the defendant to the conciliator. The conciliator on receipt of that application held that the certificate, which had been granted on the 31st of August, had become useless. Accordingly, he gave a fresh certificate on the 3rd of December in compliance with the prayer in the joint application of the 10th of September. It is contended for the appellants (defendants) that the suit brought on the 11th of December, 1908, is barred, because the plaintiff is not entitled to a deduction of the period from the 23rd of May to

the 10th of September, 1908. We think that that period ought to be deducted, because the whole proceeding from the 23rd of May to the 3rd of December, when the certificate was given, was substantially one continuous proceeding. It is true that the conciliator held on the 20th of September, 1908, that the certificate granted by him on the 31st of August, 1908, had become useless; but when we look at the facts, it appears to us that the old certificate merged in the new. It is urged, however, by Mr. R. R Desai that this is a new case altogether which was not presented to either of the Courts below, and that it raised new facts which ought not to be allowed in second appeal; but assuming that it is a question of fact, we have jurisdiction under the new Civil Procedure Code to record our finding upon it, as the question was not determined by the Courts below and arises on facts which are admitted.

Therefore, looking to the whole proceeding from the 23rd of May 1908 to the 3rd of December 1908 as one and continuous, it must be held that the plaintiff's suit is within time.

For these reasons, the decree must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1911. September 12.

HILLAYA SUBBAYA HEGDE (ORIGINAL DEFENDANT No. 3), APPELLANT, v. NARAYANAPPA TIMMAYA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No 2), RESPONDENTS.*

Fraud—Fraudulent transfer of possession—Reversioner getting into possession from an alienee of the widow—Mortgage by alienee—Suit for foreclosure—Reversioner setting up the plea that widow's alienation beyond her life-time was void—Estoppel between mortgagor and mortgagee—Estoppel binds reversioner—Practice.

In 1878, G's widow sold certain property, belonging to G, to G A, who mortgaged it to D in 1892. The widow died in 1897. After G A's death in 1901, H (defendant No. 3), who was a reversioner of G, slipped into possession of the property by

* Second Appeal No. 19 of 1910.

1911.

HILLAYA SUBBAYA v. NARAYANAPPA TIMMAYA.

fraudulently inducing G A's sons (defendants Nos. 1 and 2) to favour his claim. In 1908, the plaintiff who claimed through D, sued to recover his money by sale of the mortgaged property. It was contended by H that it was not competent to G's widow to alienate the property beyond her life-time and that her alienation was not binding on him :—

Held, that H having obtained possession of the property by colluding with defendants Nos. 1 and 2, his fraud was sufficient in law to deprive him of the right to be heard in defence to the suit, that he was entitled to the property as reversionary heir of G.

Held, further, that defendants Nos 1 and 2 having been in possession of the property as mortgagors of the plaintiff were estopped from denying his right to foreclose the mortgage; and that that estoppel applied also to H who stepped into possession through a fraud common to H as well as defendants Nos. 1 and 2.

The true owner of property is entitled to retain possession even though he has obtained it from a trespasser by force or other unlawful means. This principle applies only when the true owner gets into possession without bringing himself within the law of estoppel

As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagor's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property

SUIT to foreclose a mortgage.

The mortgaged property belonged originally to one Ganpaya After Ganpaya's death, in 1878, his widow Devamma and his widowed sister-in-law sold the property to Ganpaya Adenaya on the 24th September 1878 He mortgaged the property to Devappa (uncle of plaintiff) on the 28th June 1892. Devamma died in 1897 and Ganpaya Adenaya died in 1901 Some time afterwards, Hillaya (defendant No 3), who was a reversioner of Ganpaya, fraudulently went into possession of the property by colluding with Ganpaya Adenaya's sons (defendants Nos. 1 and 2). The plaintiff brought this suit in 1908 to recover his money by sale of the mortgaged property. The defendant No. 3 contended *inter alia* that he was the owner of the property as reversionary heir to Ganpaya; and that the alienation by Devamma was illegal and void after her death

The Subordinate Judge dismissed the suit. This decree was reversed, on appeal, by the District Judge, who held that defendant No. 3 "contrived to slip into possession no doubt by inducing Ganpaya's sons defendants Nos. 1 and 2 to favour

his claim," and that "defendant No. 3 may or may not be the reversionary heir of Ganpaya, but having failed to take possession from Ganpaya Adenaya of the property in dispute for nearly twenty years he can derive no advantage from getting fraudulent possession through defendants 1 and 2."

The defendant No. 3 appealed to the High Court.

Nilkanth Atmaram, for the appellant

K. H. Kelkar, for the respondent.

CHANDAVARKAR, J —The facts of the case, as found by the Court below, are shortly these. The property belonged to one Ganpaya who died in the year 1878, leaving him surviving a widow by name Devamma, and a widowed sister-in-law. These two widows on the 24th of September 1878 sold the property to one Ganpaya Adenaya. Ganpaya Adenaya in the year 1892 mortgaged it to the respondent-plaintiff's uncle Devappa. Ganpaya Adenaya died in 1901 and in the year 1897 Devamma died. The respondent now sues to foreclose, the appellant resists the claim on the ground that Devamma had no right to mortgage the property beyond her life-time, and that he, as the reversionary heir of her husband, is entitled to it, free of the mortgage.

The District Judge, without finding whether the appellant is reversionary heir, has allowed the respondent's claim. He has held that Ganpaya Adenaya, the respondent's mortgagor, became owner of the property under the sale from Devamma That view of the law cannot be accepted as sound in the absence of a finding that the sale by Devamma, who had a Hindu widow's estate, was for necessary purposes, and was, therefore, binding on her husband's reversioners, and that the appellant was the reversionary heir he claimed to be.

If, therefore the case had rested solely upon the considerations above dealt with, the decree of the District Judge would have had to be reversed. But the District Judge has also recorded another finding which is decisive of the case against the appellant. The suit was brought by the respondent for foreclosure against defendants 1 and 2, his mortgagors.

1911.

HILLAYA SUBBAYA v. NARAYANAPPA TIMMAYA.

The District Judge has found as a fact upon the evidence that the appellant (defendant No. 3) revived his " old claim " against Ganpaya Adenaya and " contrived to slip into possession " of this property " by inducing Ganpaya's sons, defendants 1 and 2, to favour his claim ". At the conclusion of his judgment that finding is repeated by the Judge in these words: " Defendant 3 may or may not be the reversionary heir of Ganpaya, but having failed to take possession from Ganpaya Adenaya of the property now in dispute for nearly twenty years, he can derive no advantage from getting fraudulent possession through defendants 1 and 2 or their tenants "

This finding, which, being one of fact, has not been and indeed could not be questioned by the appellant in his memorandum of second appeal to this Court, amounts to this, that he obtained possession of this property by colluding either with defendants 1 and 2, who are the heirs of the respondent's mortgagor deceased, or with their tenants. This fraud on the part of the appellant is sufficient in law to deprive him of the right to be heard in defence to this suit, that he is entitled to the property as reversionary heir of Devamma's husband. The law is that no man shall be allowed to profit by his own fraud and it would be a violation of that sound maxim if we were to allow the appellant to succeed in this suit after he has obtained possession by means of fraud and collusion.

No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lallu bin Raghushet* v. *Annaji Parashram* (1), and *Bandu* v. *Naba* (2). But that is so only where the true owner gets into possession without bringing himself within the law of estoppel Here the facts raise an estoppel as against the appellant whose ownership is denied and has to be proved. As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. As is said in the text-books, a mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of

(1) (1881) 5 Bom. 387 at p. 391. (2) (1890) 15 Bom. 238.

his mortgagor to mortgage the property. Therefore defendants Nos. 1 and 2, having been in possession of the property as mortgagors of the respondent (plaintiff), were bound to hold it in that capacity. If they were threatened or obstructed by the appellant claiming as the true owner, they ought to have given him (plaintiff) notice of the threat or obstruction so as to enable him to defend his rights as a mortgagee. But according to the finding of the learned District Judge, instead of doing that, they colluded with the appellant and that collusion was brought about by the appellant himself. It is by means of his own fraud that the appellant got into possession with the help of defendants 1 and 2, the heirs of the mortgagor. Under these circumstances the rule of estoppel which applied to them extends to the appellant also : *Pasupati* v. *Narayana* [(1)]. On this ground, and this ground alone, the decree must be confirmed, without prejudice to the right, if any, of defendant No 3 to recover possession of this property by a separate suit. We must, therefore, confirm the decree of the Court below with costs.

1911.

HILLAYA SUBBAYA v. NARAYANAPPA TIMMAYA.

Decree confirmed.

R. R.

(1) (1889) 13 Mad. 335.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GOVIND BABA GURJAR (ORIGINAL DEFENDANT), APPELLANT, v. SHRIMANT JIJIBAI SAHEB (ORIGINAL PLAINTIFF), RESPONDENT.*

1911. *September 14.*

Ornaments—Unauthorized Pledge—Suit against pledgor—Subsequent pledge—Recovery of Judgment against pledgor—Non-satisfaction—Suit against pledgee for detention after demand—Tort-feasors—Judgment not res judicata—*Omission to raise an issue suggested by defendant—Defendant not claiming under a person against whom the issue was decided after defendant's transaction—Moveable property—Doctrine of* lis pendens *not applicable—Party and privy.*

Plaintiff brought a suit, No. 159 of 1897, against M to obtain a declaration that M was not adopted by plaintiff's step-mother and that she (the plaintiff) was the owner of the property in suit as the heir of her father and to obtain possession. The cause of action was laid in March 1897. The property in suit included

* First Appeal No. 191 of 1908.

1911.

GOVIND BABA GUJAR v. JIJIBAI SAHEB.

ornaments of considerable value which M had pledged with his creditor. After the filing of the suit M redeemed the ornaments and again pledged them with G with the exception of two which had already been pledged with G. The plaintiff recovered judgment against M but it was not satisfied. The plaintiff then brought the present suit, No 56 of 1908, against G as pledgee of the ornaments from an unauthorized pledgor for detention of the ornaments after demand on or about the 11th August 1907 The defendant G answered that the judgment in the suit of 1897 was a bar to the present suit on the ground that the pledger and the pledgee were joint tort feasors and the matter had passed into *res judicata* At the hearing of the suit the defendant wanted the Court to raise an issue as to whether M was not the validly adopted son, but the Court refused to frame the issue and admitted the judgment in the suit of 1897 (which had decided the issue in the negative) in evidence on the ground *inter alia* that the defendant, who was M's pledgee in that suit was a privy to it The Court overruled the defendant's plea of *res judicata* and allowed the plaintiff's claim for the recovery of the ornaments or their value

Held, on appeal by the defendant, that the defendant's plea of *res judicata* could not stand The cause of action in the second suit must be precisely the same as the cause of action in the first suit in order to make the judgment in the first suit a bar to proceedings in the second suit

Held further, that it was an error not to raise an issue as to whether M was not the validly adopted son and to admit the judgment in the *former* suit in evidence on the ground that the defendant was a privy to it The judgment in the *former* suit was subsequent to the pledge and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined The fact that the former suit was pending at the time of the pledge of the ornaments could not prejudice the defendant on the issue of *res judicata*, for the doctrine of *lis pendens* did not apply to moveable property. The defendant was, therefore, not a privy of M and was not bound by that judgment.

Held also, that the judgment in the previous case was irrelevant to prove that M had got possession of the ornaments by means of fraud

FIRST appeal against the decision of S. S. Wagle, First Class Subordinate Judge of Thana, in original suit No. 56 of 1908.

The facts of the case were as follows —

Sardar Manajirav Raghojirav Angre of Alibag in the Thana District died in August 1896 leaving him surviving his widow Gajrabai Saheb and a daughter Jijibai Saheb, a minor, who was the step-daughter of the widow Gajrabai Saheb died at Alibag on the 11th March 1897. After her death, one Madhavrav Khanderav Barge, alleging that he was adopted by Gajrabai Saheb and assuming the name Raghojirav Manajirav

1911.

Govind Baba Gurjar v. Jijibai Saheb.

Angre, took possession of all the moveable and immoveable property of the deceased Sardar Manajirav Angre and pledged ornaments of considerable value with Vithaldas Narottamdas. Jijibai Saheb, who was residing at Baroda with her maternal grand parents at the time of Gajrabai Saheb's death, having learnt of the alleged adoption of Madhavrav Khanderav Barge and the recovery of possession by him of the estate, brought a suit, No. 159 of 1907, in the Court of the First Class Subordinate Judge of Thana against him as defendant 1 and Ravji Hari Athavle, a clerk managing the estate, as defendant 2, to obtain *inter alia* (1) a declaration that Madhavrav Khanderav Barge was not adopted by Gajrabai Saheb, and that if an adoption ceremony did take place it was void, and (2) for a declaration that the plaintiff was the owner of the plaint property as heir of her father Manajirav Raghojirav Angre, and (3) to obtain possession of the same It was alleged that Gajrabai Saheb died of plague on the 11th March 1897 and she was in an unconscious condition on the 9th March, when the adoption was said to have taken place, and that neither the plaintiff nor any one on her behalf being present at Alibag at the time of Gajrabai Saheb's death, defendant 1 with the help of defendant 2 took possession of all moveable and immoveable property and papers of the deceased Manajirav. The cause of action was laid on the 11th March 1897 and the suit was filed on the 15th October following.

After the suit was filed defendant 1, Madhavrav Barge, redeemed all the ornaments except two from Vithaldas Narotamdas and pledged them again with Govind Baba Gurjar, a retired pleader residing at Alibag, on the 20th October 1897. The two ornaments were already pledged with Govind Baba Gurjar on the 12th June 1897.

The Subordinate Judge having decreed the plaintiff's claim, the defendants presented an appeal, No 9 of 1900, to the High Court, which, on the 7th January 1901, confirmed the decree with very slight modifications.

Jijibai Saheb having failed to obtain satisfaction of the said decree, she filed the present suit against the pledgee Govind

1911.

GOVIND BABA GURJAR v. JIJIBAI SAHEB.

Baba Gurjar alleging that the ornaments in list A annexed to the plaint were, after the death of Girjabai Saheb, wrongfully delivered in the defendant's possession by Madhavrav Khanderav Barge, that though the delivery of the ornaments by Madhavrav to and receipt of the same by the defendant was unlawful, the defendant wrongfully retained them in his possession and that though the plaintiff had demanded the ornaments from the defendant by a notice, dated the 30th July 1907, the defendant refused to comply with the plaintiff's demand on or about the 11th August 1907, hence the cause of action arose on that day. The claim was valued at Rs. 40,000 and the suit was filed on the 10th March 1908.

The defendant answered *inter alia* that in suit No. 159 of 1897 the plaintiff obtained a decree against Raghojirav Angre *alias* Madhavrav Barge for the recovery of the same ornaments or their value, therefore the plaintiff was debarred from suing the defendant for the same ornaments, that the plaint did not disclose a proper and sufficient cause of action to sue the defendant, that Raghojirav Angre *alias* Madhavrav Barge pledged some ornaments with the defendant and in suit No. 159 of 1897 the plaintiff had acquiesced in the defendant's *bona fides*, therefore Raghojirav should be made a party to the suit, that the plaintiff was not the proper heir to the property of the deceased Manajirav Angre, the proper heir being his adopted son Raghojirav, that in suit No. 159 of 1897 the plaintiff had impliedly acquiesced in the *bona fides* and purity of the transaction of the defendant in taking a pledge of the ornaments and advancing money to Raghojirav, therefore, the plaintiff's suit against the defendant could not lie, that the defendant put in a list of the ornaments pledged with him by Raghojirav and their value was about Rs. 6,250, that the allegation about wrongful giving and wrongful taking of the ornaments was false, that the suit was brought in collusion with Raghojirav, that Raghojirav, thinking that it was not profitable to him to redeem the pledge, had executed an agreement by way of *sodchitti* (relinquishment) in favour of the defendant and that the ornaments entered in the list produced

by the defendant were originally pledged by Raghojirav with Vithaldas Narottamdas and he redeemed and pledged them with the defendant for the expenses of the funeral ceremonies of Gajrabai Saheb, for the obsequies of Manajirav, for payment of Government assessment, and for other proper and necessary expenses. The defendant had, therefore, a lien on the ornaments for Rs. 22,054-4-0 and the plaintiff was not entitled to get them without paying that amount.

After the issues were framed, the defendant's pleader asked for the following two issues :—

(1) Whether the plaint discloses a cause of action against the defendant?

(2) Whether Madhavrav Khanderao Barge was adopted by Gajrabai and whether the adoption was valid?

The Subordinate Judge refused the issues on the ground that the plaint clearly disclosed a cause of action and the second issue was decided by the High Court in appeal No. 9 of 1900 in suit No. 159 of 1897

On the issues raised by the Court the findings were that (1) the judgment in suit No 159 of 1897 was not a bar to the present suit, (2) Raghojirav Manajirav Angre *alias* Madhavrav Khanderav Barge was not a necessary party to the suit, (3) plaintiff was the heir of Manajirav Angre, (4) there was no acquiescence on the part of the plaintiff to the pawn of the ornaments with the defendant so as to debar her from maintaining the suit, (5) Rs 20,000 was the value of the ornaments admitted by the defendant to have been pledged with him, (6) other ornaments mentioned in the plaint were not kept with the defendant, (7) the plaintiff was entitled to obtain possession of the ornaments pledged with the defendant by Madhavrav Khanderav Barge, and (8) Rs. 20,000 were due to the defendant.

On the strength of the above findings, the Subordinate Judge passed the following decree :—

I therefore order that plaintiff do (at her option) recover from the defendant the ornaments admitted by the defendant in his written statement or their value Rs. 20,000 (twenty thousand). I dismiss the rest of the claim. Defendant to pay the plaintiff's costs in proportion to the claim awarded and plaintiff to pay the defendant's costs of the claim rejected.

1911.

GOVIND BABA GURJAR
v.
JIJIBAI SAHEB

With respect to his findings on the first two issues the Subordinate Judge observed :—

The contention of the defendant embodied in the first issue rests on two grounds (1) the principle of law that a judgment against one of several joint tort-feasors is a bar to a subsequent suit against the others, and (2) the law of *res judicata*

Before the principle of law relied upon in ground (1) can be applied to the present case it must be shown that the previous judgment in suit No. 150 of 1897 was given against Madhavrao Khanderao Barge in respect of the same tort that forms the subject of the present suit Unless that is shown, the whole argument falls to the ground. Now what are the facts? (See the *facts stated above*.)

It appears to me clear that the cause of action in suit *No 150 of 1897* was the wrongful taking by Madhavrao on 11th March 1897 of the property of which plaintiff was owner as heir of her father Manajirao Angre

In the first written statement presented by Madhavrao Barge there was no reference to the pledge of the ornaments to the present defendant. But in a supplementary written statement filed on 24th March 1898 (Exhibit 9) he stated that certain of the ornaments were pledged with and were in the possession of his Sávkár, Mr Govind Baba Gurjar

On the same day an application was made on behalf of the plaintiff for an order to the defendant that he should not take the ornaments from the Sávkárs into his own possession, and that if he wished to redeem the ornaments, he might pay off the Sávkárs but should cause them to produce the ornaments in Court direct or hand them over to the receiver appointed by the Court An order to the Sávkárs not to deliver the ornaments to Madhavrao Barge was also asked for. The Court granted an injunction as prayed for against the defendant and the creditor Govind Baba (Exhibit 10)

It appears from Exhibit 6 that two of the ornaments were pledged with the present defendant on 12th June 1897 and the rest on the 20th October 1897, *i.e.*, after the suit No 150 of 1897 was filed.

It is obvious from these facts that the *wrong for* which Madhavrao Barge was sued in suit No 150 of 1897 was a distinct wrong from that for which the present defendant *is sued*. The two tortious acts were separate and independent, not only as to the dates of commission but as to their character also. Madhavrao Barge's mal-feasance was complete on 11th March, when he took possession of the property. The defendant's tort is said to have occurred on 11th August 1907 when he refused to deliver the ornaments to the plaintiff. "It may not unfrequently happen that the owner of a chattel who has wrongfully been deprived of his possession may have a remedy against more than one person. A may have wrongfully taken it, and B may afterwards have wrongfully detained it. A and B are not joint tort-feasors : there is a perfectly independent right of action against each." (Clerk and Lindsell's Law of Torts, pp 282 283). The cause of action in the former suit against Madhavrao Barge being thus different from the cause of action in the present suit, it cannot be said that the judgment in that suit was against a *joint* wrong-doer of the tort which forms the subject of this suit. That judgment there-

fore is no bar to the present suit. Of course, if that judgment had been satisfied by Madhavrao Barge, it would have operated as a bar to further proceedings against the defendant. (Dicey on Parties to an Action, pp. 436-437.) It would have had that effect not because Madhavrao was a joint tort-feasor but because the damage to plaintiff was the loss of the ornaments and plaintiff's claim would have been satisfied · and the satisfaction would have been a good defence to a suit against the defendant in respect of the same ornaments. But it is not alleged that Madhavrao Barge has satisfied the judgment passed against him in suit No 159 of 1897. I am of opinion therefore that that judgment is no bar to the present suit against the defendant. Then as to the second ground of *res judicata*, it was argued that the defendant claims under Madhavrao Barge, who was a party to suit No 159 of 1897, that the subject matter, *viz*, the ornaments, is the same; the title, *viz.*, the wrongful deprivation, is the same therefore, section 13 of the Civil Procedure Code is a bar to the present suit If the defendant claims under Madhavrao Barge and the subject matter and the title are the same, then it would seem that the judgment in the former suit will bind the defendant and operate as a complete bar to the defence But I am unable to accept the contention that the title, *viz.*, the wrongful deprivation of the ornaments, was the same I have already stated above that Madhavrao Barge's tort was distinct from the tort of the defendant.

The pledge to the defendant (except of two ornaments) had not occurred at the date of the institution of Suit No. 159 of 1897

The defendant's tort is said to have arisen not when the pledge was made but when he refused to deliver the ornaments to plaintiff on 11th August 1907 That tort was not a matter directly and substantially in issue in the former suit It is therefore not a *res judicata* Coming to the second issue it appears to me that the defendant's contention that Madhavrav Barge was a joint wrong-doer with the defendant can hardly be reconciled with his insistence that he (Madhavrav Barge) should be made a party to this suit It is a well-known principle of law that every person who joins in committing a tort is separately liable and there does not exist any joint liability for a wrong in the sense in which there exists a joint liability for a breach of contract (*see* Dicey on Parties, pp. 430-431) A joint tort feasor, therefore, cannot insist that the other wrong-doers should also be made defendants. On this ground Madhavrav Barge is not a necessary party to this suit. The plaintiff has already got a judgment against him and is not willing to join him as a defendant in this suit. I myself do not see that the ends of justice require Madhavrav Barge's presence in this suit, and no useful purpose can be served by joining him as a party.

The Subordinate Judge further on observed :—

In Suit No. 159 of 1897 it was held by this Court that Madhavrav Barge was not the adopted son of Gajrabai and Manajirav Angre. This decision was confirmed by the High Court.

It is argued for the defendant that he, the defendant, not being a party to that suit is not bound by it; that, he is entitled to prove that Madhavrav Barge was adopted by Gajrabai; that the decree in Suit No. 159 was obtained by fraud.

1911.

GOVIND BABA GURJAR v. JIJIBAI SAHEB

The last objection was not set up as a defence in the defendant's written statement and no issue was asked for about it. The defendant cannot therefore be allowed to urge the objection of fraud. There is not the remotest suggestion of fraud in the written statement. On the contrary the judgment in Suit No. 159 was pleaded as a bar to the plaintiff's present suit.

* * * * * *

Then there remains only the other objection that the decree in Suit No. 159 is not binding on the defendant. The defendant did ask for an issue as to whether Madhavrav Barge was adopted by Gajrabai, but I declined to frame an issue on the point, being of opinion that the question was settled by the decision of Suit No. 159 confirmed by the High Court and that it should not be re-opened. It is now argued that the decision in Suit No. 159 is not a judgment *in rem* and cannot be admitted as against the defendant who was not a party to it. A passage in Mayne's Hindu Law (pp. 204, 205, 7th Edition) is cited in support of the argument. But what Peacock, C. J., said was that a decision upon a question of adoption "is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies." Does the defendant stand in the position of a stranger? He was certainly not a party to the previous suit, but was he not a privy? Privy, as distinguished from a party, "signifies him that is a partaker or hath interest, in any action or thing".

"Privy to" is used in the sense of having knowledge of a thing (Stroud's Judicial Dictionary). Now the defendant admits that he came to know of the Suit No. 159, two or four days after it was instituted. He was also Madhavrav's pleader in that suit. It is therefore impossible to hold that he was not a privy to that suit. The bulk of the ornaments were pledged with him after the institution of that suit, *i.e.*, *pendente lite*. In my opinion therefore the defendant is bound by the decision in Suit No. 159 of 1897.

It was admitted by the defendant's pleader that the only evidence which he desires to adduce to prove that plaintiff Jijibai is not the heir of Manajirav Angre is the evidence which will establish that Madhavrav Barge was adopted by Gajrabai. But as the question of adoption has been set at rest by the decision in Suit No. 159 and cannot be reopened, the evidence offered by the defendant cannot be received. The plaintiff's heirship to Manajirav Angre is not questioned on any other ground. Therefore my finding on the third issue is that plaintiff is the heir of Manajirav Angre.

The defendant appealed.

Jayakar, with *G. S. Rao* (Government Pleader), for the appellant (defendant).

Weldon and *Rangnekar*, with *K. H. Kelkar*, for the respondent (plaintiff).

SCOTT, C. J.:—The plaintiff sues the defendant as pledgee of certain ornaments from an unauthorised pledgor for detention

of those ornaments after demand made on or about the 11th of August 1907. That claim was preferred after the plaintiff had recovered judgment in a former action, No. 159 of 1897, against the pledgor but the judgment so recovered has not been satisfied.

It has been pleaded that the judgment in the suit of 1897 is a bar to this suit on the ground that the pledgor and the pledgee were joint tort-feasors and that upon the authority of *Brinsmead* v. *Harrison*[1] the matter has passed into *res judicata* and cannot be again agitated.

It has, however, been pointed out by Mr Justice Willes in the judgment of the lower Court in *Brinsmead* v. *Harrison*[2] that a fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment. We may also refer to the case of *Wegg Prosser* v. *Evans*[3] which shows that the cause of action in the second suit must be precisely the same as the cause of action in the first suit in order to make the judgment in the first suit a bar to proceedings in the second suit.

For these reasons we are of opinion that the plea of *res judicata* must fail in so far as it is based upon *Brinsmead* v. *Harrison*.[1]

The next question is whether the defendant was precluded from contending that the plaintiff was not entitled to the property of the person under whom she claimed. The defendant set up that his pawnor was a validly adopted son of that person But it was argued on behalf of the plaintiff that the question of his adoption had already been settled in suit No. 159 of 1897 adversely to the pawnor and that therefore as the defendant claimed through the pawnor he was bound by the judgment in that suit.

The defendant wished to raise an issue as to whether the pawnor was not the validly adopted son, but the learned Judge of the lower Court disallowed the issue and admitted in evidence

(1) (1872) L. R. 7. C. P. 547.   (2) (1871) L. R. 6 C. P. 584.

(3) [1895] 1 Q. B. 108.

1911.

GOVIND BABA GURJAR v. JIJIBAI SAHU.

the judgment in suit No. 159 of 1897 on the ground that the defendant was a privy to that judgment.

We are of opinion that in so doing he was in error. The judgment in suit No. 159 of 1897 was no bar to the issue sought to be raised by the defendant as it was subsequent to the pledge and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined, see *Doe dem Foster* v. *The Earl of Derby*[1], *Hodson* v. *Walker*[2], and *Niaz-ullah Khan* v. *Nazir Begam*[3]. The fact that the suit No 159 of 1897 was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in this suit cannot prejudice the defendant on the issue of *res judicata*, for, the doctrine of *lis pendens* does not apply to moveable property, see *Wigram* v. *Buckley*[4]. The defendant therefore was not a privy of the person who was defendant in suit No 159 of 1897 and is not bound by that judgment.

We must, therefore, set aside the decree of the lower Court and remand the case for re-trial upon the second issue propounded by the defendant and disallowed by the Subordinate Judge. On the remand the Subordinate Judge should, if required so to do by the defendant, compel the production of the books held by or on behalf of the plaintiff which were not produced at the first hearing.

For the reasons which we have already given for holding that the judgment in suit No. 159 of 1897 did not operate as *res judicata* on the question of adoption, we hold that it was also irrelevant on the question whether the pawnor got the pledged property by means of fraud. That is a question which, if the plaintiff wishes to establish it, must be proved by evidence in this suit.

The issues to be determined on remand will be the issues of adoption and fraud, and the lower Court must pass a fresh decree after going into those issues.

(1) (1834) 1 Ad. & E. 783 at p. 790.
(2) (1872) L. R. 7 Ex. 55.
(3) (1892) 15 All. 108.
(4) [1894] 3 Ch. 483.

We express no opinion on any other issues except those that we have dealt with in our judgment.

Costs of this appeal must be dealt with by the trying Judge on remand.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr Justice Chandavarkar.

1911. *September* 29.

PARVATIBAI, WIDOW OF TRIMBAK GANESH AGASHE (ORIGINAL PLAINTIFF), APPELLANT, *v.* YESHWANT KRISHNA SHETE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—Agriculturist—Definition †—Sources of income—Agriculture—Scholarship or stipend received by a student is not income from non-agricultural sources.

The income from agricultural sources of two brothers was Rs. 250 a year. They had two houses which yielded as rent Rs. 30 a year One of the brothers held a scholarship of Rs. 15 a month, and the other received a stipend of Rs. 7 a month at a training college The money they thus received from non-agricultural sources amounted to Rs. 294. A question having arisen whether they were agriculturists within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).—

Held, that the brothers were agriculturists, for the money they received either as scholarship or stipend were mere bounties.

SECOND appeal from the decision of P E. Percival, District Judge of Satara, reversing the decree passed by J. H. Betigiri, Subordinate Judge of Rahimatpur.

Execution proceedings.

The decree under execution was obtained by Trimbak (the husband of Parvatibai) against the father of the defendants. Parvatibai applied to execute the decree by attachment and sale of the defendant's house The defendants objected to the

* Second Appeal No 130 of 1911.

† The definition runs as follows :—

"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

1911.

PARVATIBAI v. YESHWANT KRISHNA.

attachment and sale, on the ground that they were agriculturists. The income of the defendants from agriculture was Rs. 250 a year. They had two houses which fetched Rs. 30 a year. One of the defendants was a student in the Bombay Veterinary College and held a scholarship of Rs. 15 a month. The other defendant was a student in the Training College at Poona and received a stipend of Rs 7 a month.

The Subordinate Judge found that the income of the defendants from agriculture was Rs 250 a year; and their income from non-agricultural sources was Rs 294 a year (that is Rs. 30 from house-rent and Rs 264 from scholarship and stipend). He held that the defendants were, therefore, not agriculturists. The execution was ordered to be proceeded with.

On appeal the District Judge was of opinion that the money which the defendants received either as scholarship or stipend could not be regarded as settled income; and held that the defendants were agriculturists.

The decree-holder appealed to the High Court.

K. H. Kelkar, for the appellant —The money earned by scholarship is income of the family and ought to be taken into account. The burden of proving the status of an agriculturist lies on him who set it up. It is for him to prove that his income from agricultural sources predominates over others

S. R. Bakhale, for the respondent.—The definition speaks of earning livelihood. The word "earn" according to Webster means to acquire by labour, service or "performance." It involves the idea of working for gain; and to determine whether a person is agriculturist or not, one should take into account the income that he gets as an earning. A scholarship or a stipend cannot be taken as earning.

RUSSELL, J.:—As the lower appellate Court has said that this is a novel point upon which there is no authority I propose shortly to state the facts of this case, which are admitted on both sides.

The two defendants are brothers, one a major and the other a minor. They earn at most Rs. 250 from agriculture and only Rs. 30 from the rent of two houses. One of them holds a

scholarship of Rs. 15 a month in the Veterinary College, Bombay, the other is a student in the Training College, Poona, and gets a stipend of Rs. 7 a month. Last year he was a school-master for about ten months and earned Rs. 9 a month. If the scholarship and stipend are added to Rs. 30 the total is Rs. 294, so that in that case the total income is not principally from agriculture. The question is, can these two brothers be deemed to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act in respect of the Rs. 15 a month and Rs. 7 a month abovementioned respectively? Clause (1) to section 2 of the Act says . " 'Agriculturist ' shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits "

In the present case it is unnecessary to consider the last clause of section 2. The question, therefore, that arises is: do these two young men earn their livelihood from agriculture or in consequence of these stipends are they anything less than agriculturists? The Legislature in the Act have declined to give an accurate definition of what an "agriculturist" is. Far be it from me to attempt to give it any definition so as to embrace the meaning of this word under all circumstances, and I merely deliver this judgment upon the facts as now before us.

It appears to me that it would be impossible to say that these stipends which these young men receive could be said to be earnings for their livelihood. In my view they are in the nature of bounties which may cease at any time. We have not been told how long either the scholarship or the stipend are to continue. They are what might be called windfalls by which these young men are assisted to eke out their livelihood which is derived to my mind entirely from agriculture.

In my opinion, therefore, the decree must be confirmed and the appeal dismissed with costs.

1911.

PARVATIBAI v. YESHWANT KRISHNA.

CHANDAVARKAR, J.—The question is, whether a person who gets a scholarship can be said to be a person who derives his income from that scholarship and earns his livelihood from it, within the meaning of the definition of "agriculturist" in the Dekkhan Agriculturists' Relief Act. The words of the definition are:—"'Agriculturist' shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits." A person, to fall within the definition, must be one who works for gain as an agriculturist and whose income is derived from agricultural labour. The underlying idea of the definition is that agricultural labour must be contrasted with labour of other kinds and the income derived by a man must be income derived from some occupation, agricultural or other, pursued for livelihood. Now in the case of a student who holds a scholarship and derives income from it, it cannot be said that he is following any occupation or is engaged in any labour for the purpose of his livelihood. He cannot be described as a labourer or as a person who is earning his income by work for his livelihood. The scholarship is a mere matter of bounty and a student is one who is qualifying himself for an occupation or some labour which would enable him to earn his livelihood. If we bear in mind, therefore, the dominant idea of the definition, and the eleemosynary and precarious character of a scholarship as contrasted with the essential characteristics of labour for livelihood, it is reasonable to conclude that a scholarship held by a student was intended by the Legislature to be excluded from the kinds of income contemplated by that definition.

On these grounds, I think that the District Judge was right in the view which he took and the decree must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

PANDURANG BHIWAJI, APPELLANT, v. GANGARAM GANU DEOKAR AND OTHERS, RESPONDENTS.*

1911. *October 4.*

City of Bombay Improvement Act (Bombay Act IV of 1898)—Tribunal of Appeal—Jurisdiction—Apportionment of compensation money—Questions of title of several claimants.

The Tribunal of Appeal constituted under the provisions of the City of Bombay Improvement Act (Bombay Act IV of 1898) has jurisdiction to decide questions relating to the apportionment of compensation money as between several claimants and also to decide questions of title.

APPEAL from the decision of the Tribunal of Appeal, constituted under the provisions of the City of Bombay Improvement Act (Bombay Act IV of 1898).

This was a reference made by the Special Collector to the Tribunal of Appeal for apportionment of compensation money which he awarded for the compulsory acquisition of a house and which was claimed by the several claimants before him.

The Tribunal of Appeal went into the question of title of each one of the claimants and apportioned the compensation money as between them.

One of the claimants appealed to the High Court.

Jayakar, with *M. W. Pradhan*, for the appellant.

Rangnekar, with *I. J. Samson*, for respondent No. 1.

T. A. Gandhi, for respondent No. 3

V. S. Bhandarkar, with *Y. V. Bhandarkar*, for the added respondents.

RUSSELL, J.:—This was a reference for the apportionment of the sum of Rs. 7,142-14-6 awarded as compensation by the Special Collector in respect of a house acquired by the Bombay Improvement Trust.

The facts so far as they are material for this judgment are that one Ganu had three sons, Bhiva, Gangaram and Narayan.

* First Appeal No. 94 of 1910.

1911.

PANDURANG BHIWAJI v. GANGARAM.

Gangaram was the step-brother to Bhiva and Narayan The house in question was bought in 1869 for Rs 700, the conveyance (Exhibit 1) being in the name of Bhiva who was then about nineteen years old and was working as a printer for about Rs. 30 a month. Gangaram was about two years the junior to Bhiva and two years senior to Narayan; and Narayan at the time of the purchase was about fifteen years of age working in a liquor-shop.

The Tribunal of Appeal held that the purchase money must have come from the father Ganu and (after making some necessary deductions immaterial for this case) that the balance available for apportionment amongst these three persons was Rs. 5,017-10-6, and they apportioned that sum between Gangaram and the descendants of Bhiva and Narayan in three equal parts respectively.

After the case had been argued by the appellant's counsel, Mr. Jayakar, at length, the question was raised whether this apportionment by the Tribunal of Appeal would oust the jurisdiction of the High Court in the matter. The point was raised by ground No 18 of the grounds of appeal which is: "The Tribunal ought to have directed the parties to a regular suit, having regard to all the circumstances." This point involves a consideration of the position of the Tribunal of Appeal in such cases. But, as has been said, the point was not touched upon till the argument for the appellant was nearly concluded.

The Court of Tribunal of Appeal is appointed under section 48, clause (3), of the City of Bombay Improvement Act IV of 1898. We read clauses 1, 2, 3 and 10 of that section. In the Act there is no definition of "Court." By section 47 of the said Act certain portions of the Land Acquisition Act, I of 1894, are made to apply to the acquisition of land under Bombay Act IV of 1898. And schedule A of the City of Bombay Improvement Act sets out the portions of the Land Acquisition Act of 1894, regulating the acquisition of lands under the former Act.

In section 3 of the Land Acquisition Act, clause (*d*), "Court" is defined as meaning a principal Civil Court of original jurisdiction, unless the Local Government has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act. This clause expressly does not apply to the City of Bombay Improvement Act.

From this we infer that a "Special Judicial Officer" having *been appointed by the Bombay Improvement Act he is vested* with the power of "the Court" under the Land Acquisition Act, *i.e.*, a principal Court of civil jurisdiction. This mode of legislation is, in our opinion, very much to be deprecated. References to other Acts and the inclusion of them in subsequent Acts only lead to unnecessary confusion.

By Schedule A of the Bombay Improvement Act, Part IV of the Land Acquisition Act, which deals with the apportionment of compensation, does apply to the City of Bombay Improvement Act The material section of Part IV in the Land Acquisition Act is section 30 which is as follows :—

"When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court."

In consequence of the decision of Sir Lawrence Jenkins in *Hari* v. *Secretary of State for India*[1], that the Tribunal of Appeal was not a Court of Justice and that the limited right of appeal under the City of Bombay Improvement Act did not come within either the extraordinary original, or the appellate and revisional civil jurisdiction of the High Court, because the local legislature had no power to control or affect by their Acts the jurisdiction or procedure of the High Court, as that power rested with the Imperial Parliament and with the Legislative Council of the Governor-General (see Statutes 24 and 25 Vict., c. 104), Act XIV of 1901 was passed by the Governor-General in Council, it having been considered advisable to legalize sub-section 11 of section 48 of the Bombay

(1) (1903) 27 Bom. 424.

1911.

PANDURANG BHIWAJI v. GANGARAM.

Improvement Act by means of a short validating Act on the model of Act XII of 1888. Sections 1 and 2 of that Act enact as follows:—

1. The City of Bombay Improvement Act, 1898, shall, so far as regards the appellate jurisdiction conferred upon the High Court by section 48, sub-section (11), thereof, be as valid as if it had been passed by the Governor-General of India in Council at a meeting for the purpose of making Laws and Regulations.

2. Subject to the provisions of section 48, sub-section (11), of the said Act, the provisions of the Code of Civil Procedure with respect to appeals from original decrees shall, so far as they can be made applicable, apply to appeals under that sub-section, and orders passed therein by the High Court may, on application to the Chief Judge of the Small Cause Court, be executed by him as if they were decrees made by himself.

Section 3 prescribes for a period of limitation for such appeals.

It will, of course, be observed that this legislation does not get over the objection raised by Sir Lawrence Jenkins that the power to create Courts in India rests with the Imperial Parliament and with the Legislative Council of the Governor-General (see Statutes 24 and 25 Vict., c. 104). But for the purposes of this case it appears to us that sufficient jurisdiction has been conferred upon the Bombay Tribunal of Appeal to confer upon it the power to deal with and decide questions relating to the apportionment of the moneys directed by them to be paid in respect of compensation. Consequently in our opinion this objection fails. Whether any of the claimants in this case would be entitled to sue the other in the High Court and whether the latter would be entitled to plead *res judicata* in consequence of the decision of the Tribunal of Appeal on the question of title among the claimants is a question which it is unnecessary for us to consider, because it does not arise now. At present we are concerned with the bare question whether for the purposes of apportionment the Tribunal had power to go into and decide the question of title raised by the claimants *inter se*. That power it has, because without deciding it, it cannot apportion the amount of compensation. That it has power to determine the amount of compensation and apportion it is not denied. If it has the power so far, it follows it

1911.

PANDURANG BHIWAJI v. GANGARAM.

has the power to decide the question of title also if that is necessary for the exercise of that power, for the two powers are in that case inter-dependent, and if the latter is denied, the former becomes ineffective and the Act unworkable. Whether the Legislature has taken away by the Act the remedy by way of a suit is another question not arising now.

But in our opinion, it would be highly desirable that these claims to apportionment involving questions of title should be decided by the High Court and not the Tribunal of Appeal, as it is obvious that very complicated questions may arise of law and fact upon which it would be more desirable to have the judgment of the High Court.

This appeal will accordingly be heard further.

[The appeal was heard further with the result that the decree passed by the lower Court was varied.]

Decree varied accordingly.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

RUKHMINI KOM MAHADU LINGADE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. DHONDO MAHADU LINGADE (ORIGINAL PLAINTIFF), RESPONDENT.*

1911. *October 16.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Co-plaintiff, res judicata as between*—*Civil Procedure Code (Act XIV of 1882), section 26*—*Joinder of parties.*

The plaintiff D and his step-mother R (defendant) brought a suit against C to recover possession of certain ornaments which formed part of the estate of M, the father of D and husband of R. It was held by the Court of first instance that R was entitled to the ornaments, because they were her *stridhan*, but the appellate Court held that she was entitled to them not because they were her *stridhan*, but because she was the absolute owner of the property. D then sued R for a declaration that he, as son and heir to M, was entitled to hold the decree. The defendant in reply contended *inter alia* that the suit was barred by *res judicata*:—

Held, that the bar of *res judicata* did not apply, inasmuch as there was no final adjudication as between R and D, and in the first suit it was a matter of no

* Second Appeal No. 782 of 1911.

1911.

RUKHMINI v. DHONDO MAHADU.

consequence to the defendant therein for the purposes of the relief to be given against him whether R succeeded or whether D succeeded.

A finding to become *res judicata* as between co-plaintiffs must have been essential for the purpose of giving relief against the defendants.

Ramchandra Narayan v. Narayan Mahadev,(1) followed.

The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit No Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit.

Attorney-General for Trinidad and Tobago v. Eriche,(2) followed.

SECOND appeal from the decision of G N. Kelkar, First Class Subordinate Judge at Belgaum with appellate powers, confirming the decree passed by E. Reuben, Subordinate Judge at Belgaum.

Suit for declaration and injunction.

The property in dispute, which consisted of ornaments, belonged originally to one Mahadu. He died in 1900, leaving him surviving his widow Rukhmini (defendant) and a son Dhondo (plaintiff) by a predeceased wife, Bhima.

In 1905, Dhondo and Rukhmini brought a suit against one Chintu to recover from him the ornaments which belonged to the estate of Mahadu. The Court of first instance held that Rukhmini was entitled to the ornaments which were her *stridhan*. In the lower Court of appeal, Dhondo was left out of consideration on the ground that there was no proof on the record that he was the legitimate son of Mahadu. The Court then framed the following issues for decision (1) whether the lower Court erred in deciding the suit on grounds not raised in the pleadings? and (2) whether the ornaments in suit were the self-acquired property of plaintiff's husband, Mahadu? Both these issues were found in the affirmative. The Court remarked as follows:—"The plaint is clearly to the effect that the ornaments in dispute were the self-acquired property of plaintiff's husband. The word *stridhan* is nowhere mentioned. The lower Court in finding them to be the plaintiff's *stridhan* went beyond the pleadings and the evidence."

(1) (1886) 11 Bom. 216. (2) [1893] A. C. 518.

In 1909 Dhondo filed the present suit against Rukhmini praying for a declaration that he was the owner of the decree in the first suit and for an injunction prohibiting Rukhmini from recovering the amount of the decree.

The defendant contended *inter alia* that the suit was barred by *res judicata*.

Both lower Courts held that the bar of *res judicata* did not apply and decreed the plaintiff's claim.

The defendant appealed

Jayakar with *C. A. Rele* for the appellants.—We submit that Dhondo's claim with reference to the ornaments is *res judicata*. He and Rukhmini were co-plaintiffs in the former suit, where the prayer was that the ornaments be declared to belong to both or either of them. It was held that Rukhmini alone was entitled to the ornaments. Dhondo's claim so far must be deemed to have been refused. See section 26 of the Civil Procedure Code (Act XIV of 1882), *Ramchandra Narayan* v. *Narayan Mahadev* [1] and *Cottingham* v. *Earl of Shrewsbury*[2].

Nilkanth Atmaram for the respondent.—Our claim is not barred by *res judicata*. In the first suit no distinct issue was raised as to the ownership of ornaments; and an adjudication upon it was not necessary to give relief against Chinto.

CHANDAVARKAR, J. —The facts of this case are shortly as follows. The present plaintiff Dhondo, and the present defendant No. 1, Rukhmini, filed a suit No. 77 of 1905, as co-plaintiffs, against one Chinto to recover possession of certain ornaments. In the plaint it was alleged that the ornaments belonged to the estate of Mahadu, father of Dhondo and husband of Rukhmini; and the co-plaintiffs asked for a declaration that the property belonged to such one of them, either Rukhmini or Dhondo, as might be held entitled by the Court.

The Court of first instance, who tried that suit, held that the property belonged to Rukhmini, because in the opinion of that Court they were her *stridhan* ornaments.

(1) (1886) 11 Bom. 216. (2) (1843) 3 Hare. 627.

1911.

RUKHMINI v. DHONDO MAHADU.

There was an appeal by Chinto, and the appellate Court confirmed the decree on the ground that the ornaments were Rukhmini's, because the second plaintiff in that suit, namely, Dhondo, had not been proved by the evidence upon the record to be the son of Mahadu. Therefore, there was a decree in that suit that the ornaments belonged to Rukhmini, the appellant before us.

In the present suit, which has led to this second appeal, Dhondo, respondent before us, alleges that the ornaments, which formed the subject matter of the previous suit, and certain other property, not covered by the decree in that suit, belonged to the estate of Mahadu; that he is his legitimate son, and, in consequence, entitled to both the ornaments and the other property Both the Courts below have awarded his claim and held that he is entitled not only to the immoveable property which was not covered by the plaint in the previous suit, but also to the ornaments which formed the subject matter of that suit

The decree of the Court below in the present suit is assailed in second appeal before us; first, upon the ground that the claim of the plaintiff with reference to the ornaments is *res judicata*; and the learned Counsel for the appellant, Rukhmini, relies upon section 26 of the Code of Civil Procedure which applied to this litigation, having been in force at the time the plaint was filed, and also upon the principle of certain decisions of this Court, the leading decision being in the case of *Ramchandra Narayan* v. *Narayan Mahadev*[1].

Section 26 of the old Code of Civil Procedure provided.—

"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment."

It is contended by Mr. Jayakar for the appellant, that when two co-plaintiffs bring forward a claim, and ask for a decree in favour of either one or other of them in the alternative, and

(1) (1886) 11 Bom. 216.

the Court grants relief to one of the plaintiffs, the finding that that plaintiff is entitled to the relief on the ground of the title proved becomes *res judicata* in any subsequent suit between the said co-plaintiffs for the same subject matter. In support of that contention reliance is placed upon the principle of the decision to which we have already referred, where it was held by this Court that "where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants." But as was said there "without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group."

It is contended that the same principle applies as between co-plaintiffs. Assuming it does, the question is whether the principle can be held to apply to the facts of the present case. In our opinion it cannot be held to apply. The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit, and as has been held in several decisions "no Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit": see *Attorney-General for Trinidad and Tobago* v. *Eriche*[1]. In the previous suit, no doubt, the Court of first instance held that Rukhmini was entitled to the ornaments, because in the opinion of that Court they were her *stridhan*; the second Court held that Rukhmini was entitled to those ornaments, not because they were her *stridhan*, but because she was the absolute owner of the property. These findings cannot be treated as *res judicata* as between co-plaintiffs in that suit, that is, as between Rukhmini the defendant, and Dhondo the plaintiff in the present suit, because no issue was raised in the Court of first instance in that suit which brought out the question in a pointed form. The only question that was raised there was whether Rukhmini was the absolute owner of the

(1) [1893] A. C. 518.

1911.

RUKHMINI v. DHONDO MAHADU.

property Now that issue was capable of construction in only one way, namely, whether she took an absolute interest in the estate of her deceased husband, though a Hindu widow. Still the Subordinate Judge was of opinion that she was the absolute owner of the ornaments because they were her *stridhan* The second Court held in her favour, but upon another ground We cannot say that there was a final adjudication as between Rukhmini and Dhondo which made it *res judicata* for the purpose of any subsequent litigation The principle of *Ramchandra Narayan* v. *Narayan Mahadev*[1] is wanting in the facts of the present litigation As was held in that case, a *finding in a suit as between co-defendants becomes res judicata* in a subsequent suit only when it was essential for the purpose of giving relief to the plaintiff in the previous suit So also as between co-plaintiffs a finding to become *res judicata* must have been essential for the purpose of giving relief against the defendants Now here, in the previous suit it was a matter of no consequence whatever to the defendant therein for the purposes of the relief to be given against him whether Rukhmini succeeded or whether Dhondo succeeded Therefore, the plea of *res judicata* raised in this second appeal must be disallowed

But the appellants are entitled to succeed as to the ornaments upon another ground The plaintiff came into Court alleging that he was the owner of the ornaments The burden of proof lay upon him to show that the ornaments belonged to the estate of Mahadu and that they were not the *stridhan* of Rukhmini. Therefore, he ought to have given evidence to prove his allegations. The bulk of the evidence was directed towards proving whether Rukhmini was the widow of Mahadu or not The Subordinate Judge held that the ornaments belonged to Mahadu's estate, because it had been so held in the previous suit and probably it is also the ground on which the Subordinate Judge in the Appellate Court has proceeded But if the finding in the previous suit cannot be treated as *res judicata*, it cannot be used against

(1) (1886) 11 Bom. 216.

either of the parties. The plaintiff was bound to prove his case. And although we cannot take into consideration the evidence in the previous suit, yet we have the fact that the appellant obtained a decree entitling her to the ornaments and that the respondent was a party to it. The burden lay upon the plaintiff to prove that the ornaments were not the *stridhan* of Rukhmini.

In this case the plaintiff has not discharged the onus which lay upon him. The facts stand thus: Rukhmini has a decree in her favour; to that decree Dhondo was a party; the plaintiff has not proved that the ornaments are not the *stridhan* of Rukhmini On these grounds, therefore, the decree of the Court below so far as the ornaments are concerned must be reversed. We must, therefore, amend the decree by deleting that portion of it which relates to the decree in original suit No. 77 of 1905 and the ornaments there concerned. The plaintiff is declared to be the owner only of such property as is not covered by the decree in that previous suit.

The decree must be amended accordingly.

Each party to bear his own costs throughout.

Decree amended.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1911. *March* 10.

CASSAMALLY JAIRAJBHAI PEERBHAI, PLAINTIFF, *v* SIR CURRIMBHOY EBRAHIM AND OTHERS, DEFENDANTS.*

Khoja Mahomedan—Settlement—Settlor himself trustee—No delivery of possession—Son born after Settlement—Power of Settlor to revoke settlement—Settlor's intention not carried out owing to settlor's death—Power of Court to aid defective execution—Suit by after born son to set aside settlement—Limitation Act (IX of 1908), section 10—Resulting trust back to settlor—Adverse possession—Difference between estoppel and res judicata*—Validity of Wakf contained in deed containing other gifts—Local usage cannot override Mahomedan Law—Registration*—Vis Major.

By an Indenture of settlement dated 7th January 1886, J. P, a Khoja Mahomedan, purported to convey certain immoveable properties to trustees for the benefit of his family. The trusts were in effect for J. P. for life and after his death, subject to certain rights of residence and maintenance to pay the net income of the trust properties to N. M for his life and in the event (which subsequently occurred) of the death of N. M. without leaving male issue, to divide the trust funds into ten equal parts to be held in favour of certain donees, four-tenths being given to charity. The Indenture also reserved to the settlor power to revoke or vary any of the trusts contained therein. There was no surrender of the property in fact to anyone except J P himself in his character as trustee for himself. The donor, however, opened an account in his books of this property as trust property. On the 26th October 1886 a second son, the plaintiff, was born to J. P. whereupon J. P being desirous of providing for this second son, desired to vary the terms of the deed of the 7th of January 1886 and to resettle the same so that his two sons should share equally. A draft deed of declaration of new trusts was accordingly prepared by J. P.'s attorneys and on the 24th of July 1887 was finally settled and approved by J. P. An engrossment was thereupon made and duly stamped but on taking the engrossment to J P. for his execution on July 29th it was found that owing to an error of the engrossing clerk several pages of it were missing Another engrossment was prepared forthwith but on the same day before the new engrossment was ready J. P. died. The plaintiff thereupon brought a suit to have it declared whether or not the deed of 1886 was a valid deed and prayed that the defective execution of the second deed might be aided by the Court and the provisions of the said second deed declared to be valid.

Held, (1) That the plaintiff was not time-barred as against the trustees from bringing the action.

(2) That however restricted the gift was in form to J. P it was in effect a gift absolute to him for life, and that entirely irrespective of the power of revocation.

* Suit No. 659 of 1909.

(3) That all the gifts in the trust settlement made contingent upon N. M. dying without issue were bad.

(4) That that portion of the instrument which purported to create a *wakf* in respect of four-tenths of the settled property was bad and void.

(5) That the gift was bad for want of contemporaneous delivery of possession.

(6) That this was a case, if ever there was a case, in which the Courts might act upon those principles which have always guided the Courts of Equity in England and aid defective execution of a power, defective not through any fault on the part of the person intending to execute it but by reason of an act of God, and that the unsigned deed ought to be effectuated by the Court to the extent of making it binding on the conscience of the trustees.

PER CURIAM.—It is only in the event of the trusts or some of them being bad that the question of limitation can arise. For if a trust-deed in its entirety is good, then of course effect must be given to it irrespective of any question of lapse of time.

Where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by tresspass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trusts declared are in themselves wholly or partially bad, then there is a resultant trust to the author of the trust and the possession of the trustees, whatever they might think of it and however they might intend to use it for the purpose of carrying out the bad trusts, could not in law be adverse to the *cestui-que-trust*, that is to say, the grantor Widely different is the case of trustees who obtain the legal estate from the author of the trusts to apply the beneficial uses to specified objects which may or may not be good For then from the beginning there is always a relation between the author of the trusts and the trustees in whom his confidence has been reposed and there is always the legal possibility at least of another relation coming into existence between them where owing to the failure of the declared trusts, there is a resultant trust back to the grantor who from that moment becomes in law the *cestui-que-trust* of the trustees.

Where it was the intention that there should be an ultimate trust in favour of the grantor it is usual to express that on the face of the deed. A deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express and resultant trust.

The current of authority seems to have set steadily against the extension of section 10 of the Limitation Act to all cases of resultant implied or constructive trusts.

Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed, but when the extinction

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

or failure of all the intended trusts is a condition precedent to the resultant trusts coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed.

The answer to the question: What is the true position when declared trusts failed and there is a resultant trust over to the settlor or his heirs? is to be found in the very elementary proposition that the possession of the trustee is always that of *cestui-que-trust*, and, therefore, however, he may think or wish to be holding as trustee for trusts which have failed in the eye of the law, he is really holding, when those trusts failed, as trustee for the settlor Then the position is simply this: so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder for two claimants, the intended beneficiaries of the declared trusts which have failed, and the resultant trustee, that is, the settlor And no length of possession by a trustee can be adverse to his *cestui-que-trust* as soon as that legal person is discovered and ascertained.

So long as a trustee occupies the position of a trustee as soon as declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui-que-trust* and can only be changed into adverse possession by a conscious and deliberate act, that is to say, that he must repudiate all intention of holding for the resultant *cestui-que-trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. Then his possession might become adverse to his legal *cestui-que-trust* and if that person did not take steps within twelve years he might not be able to avail himself, under the Indian authorities, of the provisions of section 10 of the Limitation Act.

Estoppel and *res judicata* are entirely distinct. *Res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.

It is consistent with the Mahomedan Law that a Mahomedan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of property: *Jamabai* v. *R. D. Sethna*[1] considered.

The power of revocation is inherent in the donor of every gift, so that expressing it, as is usually done by English draftsmen in these voluntary settlements, is merely surplusage and so far from invalidating the gift as a whole would necessarily be implied in it were it not expressed.

Under the Mahomedan Law where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void.

A gift to the donor himself for his life and then over to others could not be reconciled with any recognised principle of the Mahomedan Law of gift and must necessarily therefore, so far as the remoter donees are concerned, be bad *ab initio*.

Jamabai v. *R. D. Sethna*[1] followed.

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

A vested remainder in the strictest sense of the English words and *a fortiori* a contingent remainder could not possibly by any stretch of ingenuity be made the subject of a valid Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession *in præsenti* of that which may never come into possession at all. It is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee and if the donee does not take physical possession of it at the time of making the gift, then till he does, the gift is revocable.

There is no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely

It is undoubtedly a rule of the Mahomedan Law that where a donor makes a gift and accepts in exchange something, whether that something be independent of or part of the original gift then the rest of the gift is irrevocable. No gift *in futuro* can be made by a Mahomedan *inter vivos*, in order to validate such a gift there must be an actual delivery of seisin to the donee, there ust be a transfer of possession and that transfer of possession must be from the donor to the donee.

While the Mahomedan Law insists that a gift to private person should be free of all pious and religious purposes, this does not necessarily prohibit the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons.

It appears to be the Mahomedan Law that a donor may give his property in *wakf*, that is to say, appropriate and dedicate the corpus to the service of God, while reserving for himself a life-interest in the usufruct. But as in the case of gifts to private individuals the Mahomedan Law never contemplated and will not allow a merely contingent gift in *wakf* This necessarily flows from the jural conception of a *wakf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life interest in that property does not in any way clash with that conception for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of *some future uncertain events. There can, in such circumstances, be no appropriation* synchronizing with the declaration because should the future events happen it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God.

It would be passing the limits of the application of the maxim "*Usus et conventio vincunt legem*" if it were sought to be shown that the Khojas are allowed by local usage to override the Mahomedan Law which prohibits any Moslem from disposing of more than one-third of his property by will.

BY an Indenture of settlement, dated the 7th of January 1886, one Jairajbhai Peerbhai, a Khoja Mahomedan of Bombay, purported to convey divers immoveable properties of great

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

value to trustees for the benefit of the various members of his family which then consisted of his wife Rehmatbai (the 6th defendant), his son Noor Mahomed (since deceased), his daughter-in-law Khanoobai, wife of Noor Mahomed (the 7th defendant) and his two daughters Sakinabai (the 8th defendant) and Jenabai (since deceased) The first defendant was the only surviving original trustee of the aforesaid Indenture and the defendants 2, 3, 4, 5, were subsequently appointed additional trustees.

The trusts of the said settlement were in effect for the said Jairajbhai Peerbhai (the settlor) for life and after his death (subject to certain rights of residence and a monthly payment of Rs. 300 to the 6th defendant and of Rs 250 to the 8th defendant and the said Jenabai) to pay the net income of the trust estate to Noor Mahomed for his life and in the event (which subsequently occurred) of the death of Noor Mahomed without leaving male issue (subject to the above rights and payments and to an additional monthly payment of Rs. 300 to the 7th defendant as the widow of Noor Mahomed) to pay the net income of the said estate to the 8th defendant and the said Jenabai and the survivor of them for their or her lives and after the death of such survivor (subject to the trusts in favour of the 6th and 7th defendants) to divide the trust funds into 10 equal parts and to hold the same .—

As to $\frac{1}{10}$th for Rahimtoola Peerbhai and his heirs.

As to $\frac{1}{10}$th for Ismail Nensi and his heirs.

As to $\frac{2}{10}$ths for the right heirs of the 8th defendant.

As to $\frac{2}{10}$ths for the right heirs of the said Jenabai

As to $\frac{4}{10}$ths for the trustees of the Jairajbhai Peerbhai Khoja Benevolent Trust Fund.

The said Indenture also reserved to the settlor power to vary or revoke all or any of the aforesaid trusts such reservation being expressed in the following terms :—

"Provided always and it is hereby agreed and declared that it shall be lawful for the said *Jairajbhai Peerbhai* at any time during his life-time by any deed or deeds, writing or writings executed and signed to vary or revoke all or any of the uses, estates and trusts hereinbefore limited and declared of and concerning the

said trust premises or any of them or any part or parts thereof and by he same or any other deed or deeds writing or writings to declare any new or other uses estates or trusts of and concerning the premises the uses or trusts whereof respectively shall be so varied or revoked as aforesaid."

After the date of the said settlement, that is to say, on or about the 26th of October 1886 a second son the plaintiff was born to the settlor.

The said Jenabai died on the 17th of November 1903 leaving her surviving as her heirs the defendants 11, 12.

The said Ismail Nensi died intestate on or about the 8th September 1908, leaving him surviving as his heirs the defendants 14, 15, 16.

The 17th and 18th defendants were the present trustees of the Jairajbhai Peerbhai Khoja Benevolent Trust Fund.

The 9th and 10th defendants were the minor sons of the 8th defendant.

The plaintiff filed this suit praying *inter alia* for the following reliefs :—

(*a*) that it might be declared whether or not the Indenture of the 7th January 1886 hereinbefore referred to and the trusts therein contained constituted a valid disposition of the said properties of Jairajbhai Peerbhai ;

(*b*) that if the said Indenture and trusts should be held to be valid, the defective execution of a deed of revocation might be aided by the Court and the provisions of the said deed declared to be valid and binding as a variation of the aforesaid Indenture or otherwise as the Court should deem right ;

(*c*) that it might further be declared that the plaintiff was absolutely entitled to all the properties comprised in the said Indenture subject only (if the Court should so hold) to the right of the 6th and 7th defendants to reside in certain of the properties and to the payment to the 6th, 7th and 8th defendants during their several lives of the monthly sums of Rs. 300, 300 and 250, respectively.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

The plaintiff based his case on the ground that neither at the date of the said Indenture of the 7th January 1886 or at any time afterwards was possession of the properties or any of them given or transferred by the settlor to the trustees, nor was the settlement acted upon in any way but all the properties continued as before in the possession and under the immediate control of the settlor and under the circumstances the said settlement was invalid according to Mahomedan law.

The plaintiff further alleged that after his birth the settlor became desirous of varying the terms of the disposition of the properties which he had made by the settlement of the 7th January 1886 and of resettling the said properties in such a way that his two sons should be equally benefitted thereby.

A draft deed of declaration of new trusts was accordingly prepared by the settlor's attorneys under his instructions and after being submitted to him and certain alterations made therein the same was on the 21st July 1887 laid before counsel with the settlor's instructions On the 24th of the same month the draft was finally settled by counsel and was thereafter explained to and approved by the settlor and an engrossment thereof was made and duly stamped by the said attorneys for execution by the settlor On the morning of the 29th of the same month the engrossment so made was taken to the residence of the settlor for execution and signature by him but upon arrival there it was found that by a blunder of the engrossing clerk several pages of the approved draft had been accidently omitted and the settlor was in consequence prevented from formally executing the declaration of trusts which he intended to execute

Another engrossment was prepared forthwith, but at 7-30 p.m. of the same day before the new engrossment was ready the settlor died, his death being the result of an accident to his hand which had occurred about a fortnight previously but which until very shortly before his death was not regarded as of a serious nature.

By the deed, which the settlor so intended to execute, it was provided in effect that the said trust premises should be held

by the trustees of the Indenture of the 7th of January 1886 after the death of the settlor, subject to the rights of residence and the monthly payments to the 6th and 8th defendants and the said Jenabai upon trust for the said Noor Mahomed and the plaintiff as members of a joint and undivided Hindu family.

After the death of the settlor the whole of the trust properties passed into the management and enjoyment of the said Noor Mahomed who, although he was himself one of the trustees under the original Indenture of Settlement, treated the said properties as his own and all the papers relating to the variation of the said trusts subsequently came into his possession and were kept by him until his death.

Noor Mahomed died intestate on the 20th August 1897, leaving him surviving his widow, the 7th defendant, but no issue. And since that date the trust premises were in the management of the first five defendants who claimed to deal with them according to the provisions of the said Indenture of the 7th of January 1886 and the plaintiff had received no benefit therefrom.

The plaintiff further relied on an oral will and also on a written but unsigned will, both made by Jairajbhai. By the said oral will the said Jairajbhai bequeathed one-half of his property to Noor Mahomed and the other half to the plaintiff.

By the said unsigned will the said Jairajbhai *inter alia* directed that upon the death of either Noor Mahomed or the plaintiff without leaving a son the survivor of them should be the owner of all his property.

The defendants 1, 2, 3 and 4 supported the settlement and alleged that after the death of the settlor Noor Mahomed was in possession and management of the trust premises only as managing trustee and for and on behalf of himself and his co-trustees.

The 5th defendant submitted to the Court whether he was a necessary party to the suit.

1911.

GASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM

The 7th defendant also supported the settlement and further contended that Jairajbhai never intended to execute the second deed, and that having regard to the arbitration and award and the decree in Suit No. 282 of 1893 and the receipt of Rs. seven lákhs by the plaintiff in pursuance of the said decree the plaintiff was debarred from impeaching the validity of the deed of 7th January 1886.

Defendants 8—18 made similar defences.

Inverarity, *Raikes* and *Loundes* for the plaintiff.

Bahadurji and *Vakil* for defendants 1—4.

Baptista and *Kajiji* for defendant 5.

Strangman, Advocate-General and *Wadia* for defendant 6.

Setalvad and *Desai* for defendant 7.

Jinnah and *Jayakar* for defendant 8.

Bahadurji and *Coyaji* for defendants 9—10.

Davar and *Mulla* for defendants 11—12.

Sayani and *Tyabji* for defendants 13, 17, 18.

Sayani and *Jaffer* for defendants 14, 15, 16

Inverarity —The first question is whether the deed of 1886 has not been varied or revoked by intention sufficiently declared by Jairajbhai Peerbhai in 1887, and if it has whether the draft deed or engrossment proposed to be executed by Jairajbhai should not be given effect to by the Court.

The second question is whether the second deed is not the real trust deed of Jairajbhai Peerbhai. If it is a further question arises whether its provisions will be given effect to by Mahomedan law. If the second deed stands good in all respects the plaintiff would take the whole of the property, if it stands good partially then the plaintiff takes half and the 7th defendant the other half. Under Mahomedan law the first deed is invalid, at any rate to a large extent.

If both the deeds are invalid the question arises whether Jairajbhai died intestate or left a will and if he left a will whether it was an oral one or written, signed or unsigned.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Five documents will be relied on:—(1) Will of 1881; (2) Deed of 1886; (3) Oral will alleged to have been made a few days before his death; (4) An unsigned will; (5) The second deed. Which of the five was the last will of Jairajbhai? We contend that the will of 1881 had been revoked *in toto* both by Mahomedan law and by the law of Equity, at all events as far as the properties in the deed of 1886 are concerned The will of 1881 was revoked by the deed of 1886 as far as the trust properties were concerned and the second deed revoked the deed of 1886 The oral will comes in where the settlement does not affect the properties The unsigned will revokes the deed of 1886. So does the oral will We submit that the unsigned will does not require execution

The first point is whether Jairajbhai left a trust deed. The laws of equity and good conscience apply *Dada Honaji* v. *Babaji Jagushet*[1], *In re Kahandas Narrandas*[2], *Mussamat F. Barlow* v. *Sophia Eveline Orde*[3], *Ramcoomar* v *John and Maria*[4].

The Courts will not aid the non-execution of a power where the owner of the power does nothing towards using the power. *Shannon* v. *Bradstreet*[5]. This is not a case of non-execution but of a defective execution. The settlor showed an intention to execute the power and his intention was to execute it in favour of his own son Farwell on Powers, 2nd Edition, page 329. When the will of 1881 was executed Jairajbhai had a wife Rehmatbai, a son Noor Mahomed and two daughters Sakinabai and Jainabai, and at that time he did not expect another child. On 28th October 1886 the plaintiff was born and Jairajbhai became desirous of altering the deed. If the will and deed hold good the new-born son would be absolutely cut out. We say Jairajbhai's intention was to revoke the deed of trust and to make a new deed by which this son should take equally with the elder one He also wished to make a new will for the same reasons. The draft of the

(1) (1865) 2 Bom. H. C. R. 36.
(2) (1880) 5 Bom. 154.
(3) (1870) 5 Ben. L. R 1 at p. 8.
(4) (1872) 11 Ben. L. R. 46 at p. 52.
(5) (1803) 1 Sch. & Lef. 52.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

new deed reproduced the old deed except that he left the residue to both the sons as *tenants-in-common*. As to the suit which is said to be a bar to this one, it was a suit filed by the plaintiff claiming half the property for the plaintiff but the trust property was purposely excluded. The arbitrators gave the go-bye to the will of 1881 and they seem to have acted on the unsigned will as they gave half the property to the plaintiff.

As to the law on the points referred to:—*Chapman* v. *Gibson*(1), *Smith* v *Ashton*(2), *Coventry* v. *Coventry*(3), *Wilson* v. *Piggott*(4), *Hawke* v *Hawke*(5), *Kennard* v. *Kennard*(6), *Carver* v *Richards*(7) We say that here the intention was very clearly manifested, otherwise the son would be left unprovided for altogether It does not matter in what form the intention is expressed As to the will, where the Indian Succession Act applies certain formalities are required, but a Mahomedan can make an oral will, and can also revoke a will without any formality.

The Transfer of Property Act was not in force at the time of the deed. The authorities support the contention that the intention of the testator, if proved, must be accepted as his will. *Mancharji Pestanji* v *Narayan Lakshumanji*(8), *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*(9), *Sri Raja Chelikani* v. *Appa Rau*(10), *Waghela Rajsanji* v. *Shekh Masludin*(11).

As to revocation of a will, marriage revokes a will, very slight circumstances added to the birth of a child would be an implied revocation. See Baillie's Digest of Mahomedan Law, pp. 281 and 628. *Emerson* v. *Boville*(12), *Johnston* v. *Johnston*(13), Williams on Executors, 5th Edn., *Castle* v. *Torre*(14), *Marston* v.

(1) (1791) 3 Bro. Ch. Cas. 229.
(2) (1839) 1 Ch. Cas. 263.
(3) (1724) 2 P. Wms. 221.
(4) (1794) 2 Ves. Jun. 351.
(5) (1877) 26 W. R. 93.
(6) (1872) 8 Ch. App. 227.
(7) (1859) 27 Beav. 488.
(8) (1863) 1 Bom. H. C. R 77.
(9) (1877) L R. 4 I. A. 228.
(10) (1897) 20 Mad. 207 at p. 209 and (1902) 25 Mad. 678.
(11) (1887) 11 Bom. 551 at p. 561.
(12) (1802) 1 Phillim. 342.
(13) (1817) 1 Phillim. 447.
(14) (1837) 2 Moo. P. C. 133.

Roe dem Fox[1], *Doe dem Reed* v. *Harris*[2]. Conduct can revoke a will as well as actual words, strong anxiety to provide for a child and conduct evidencing such anxiety is sufficient. We argue this part of the case on the assumption that we do not satisfy the Court that there is any other will of Jairajbhai and we submit that these deeds and new unsigned will are evidence of revocation of the will of 1881 If so, it is not necessary for us to set up a substantive will But we submit we can establish a subsequent will The oral will depends on the evidence of Rehmatbai She gave the same evidence before the arbitrators as she has given here The only requisite for a will of personality in England prior to 1838 was an intention to dispose of property in a particular manner if that intention is sufficiently declared It is not necessary for the testator to be aware that he was performing a testamentary act. *Milnes* v. *Foden*[3], *Doe dem Cross* v. *Cross*[4], *In the goods of Morgan*[5], where a document was admitted to probate which on the face of it did not look a testamentary document. *Montefiore* v. *Montefiore*[6], *Allen* v *Manning*[7], *Carey* v *Askew*[8], *Goodman* v. *Goodman*[9], *Robinson* v. *Chamberlayne*[10], *Green* v *Skipworth*[11], showing that instructions will operate as fully as the will itself. *Sikes* v. *Snaith*[12], *Musto* v *Sutcliffe*[13], *Lewis* v. *Lewis*[14], *Nathan* v. *Morse*[15], *Evans* v *Knight and Moore*[16], showing that only slight evidence is necessary when the provision made by the testator is what you would naturally expect him to make. *Burrows* v. *Burrows*[17], *Masterman* v *Maberly*[18], *Castle* v. *Torre*[19], *Whyte* v. *Pollok*[20]. Lastly we have the definition of a will in the Probate and Administration Act which is :— "will means a legal declaration..."

(1) (1838) 8 Ad. & El. 14.
(2) (1837) 6 Ad. & El. 209.
(3) (1890) 15 P. & D. 323
(4) (1846) 8 Q. B. 714.
(5) (1866) 1 P D 214
(6) (1824) 2 Add. 354
(7) (1825) 2 Add. 490.
(8) (1786) 2 Bro Ch. Cas. 58.
(9) (1847) 1 DeG. & S. 695.
(10) (1755) 2 Lee. 129.
(11) (1809) 1 Phillim. 53.
(12) (1816) 2 Phillim. 351.
(13) (1818) 3 Phillim. 104.
(14) (1818) 3 Phillim. 109 at p. 112.
(15) (1821) 3 Phillim. 529.
(16) (1822) 1 Add. 229.
(17) (1827) 1 Hag. Ecc. 109.
(18) (1829) 2 Hag Ecc. 235.
(19) (1837) 2 Moo. P. C. 133.
(20) (1882) 7 App. Cas. 400.

1911.

JASSAMALLY MIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

There are cases which go to show that Mahomedan and Hindu law are the same as the old English law. *Nagalutchmee Ummal* v. *Gopoo*[1], *Vinayak* v. *Govindrav*[2], *Mahomed Altaf Ali* v. *Ahmed Buksh*[3], *Mazhar Husen* v. *Bodha Bibi*[4] where a letter written by a person before committing suicide was treated as a will *Aulia Bibi* v *Ala-ud-din*[5]. Both by Mahomedan and Hindu law any document which sufficiently shows the intention of a testator is sufficient to both constitute a will and revoke it

Now as to the effect of the deed of 1886 according to Mahomedan law :—We are not concerned with contesting whether the life estate to Jairajbhai was the next life estate to Noor Mahomed, the plaintiff wishes to take the property as it stood at the time he filed his suit It appears however extremely doubtful whether a Mahomedan can give to himself any interest in property belonging to himself. To all appearances the properties remained unchanged Book entries do not count. All these points arose in *Jainabai* v *R D. Sethna*[6]. That a man cannot bargain with himself even if there are other people associated with him as trustees See *Ellis* v *Kerr*[7]. Jairajbhai remained in possession of the property and enjoyed the rents and profits thereof without impeachment of waste. No meeting of trustees was held in his life-time, and there was no change of names in the Collector's books. According to Mahomedan law a gift must be *in præsenti* and unqualified. After Noor Mahomed's death the limitations are void. As far as the gift to charity is concerned it is void because the settlor reserved a life interest to himself. Everything after the life estate to Noor Mahomed is bad according to Mahomedan law and the property reverts to Jairajbhai. The only effect of the deed is to revoke the will of 1881 as far as the trust properties are concerned. We say that no Khoja can create an estate unknown to Mahomedan law. He may will away ⅓rd of his property but he cannot create an unknown estate. How far

(1) (1856) 6 Moo. I. A. 309 at p. 320
(2) (1869) 6 Bom. H. C. R. (A. C J.) 224.
(3) (1876) 25 W. R. 121.
(4) (1898) 21 All. 91.
(5) (1906) 28 All. 715
(6) (1910) 34 Bom. 604.
(7) [1910] 1 Ch. 529

1911.

CASSUMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Mahomedan law is applicable to Khojas and Cutchi Memons see *Bai Baiji* v. *Bai Santok*[1]. A Khoja has got to establish any custom he relies on apart from that he is governed by Mahomedan law.

The next question is whether the law of wills has ever been held part of the law of inheritance and succession. There is a case to that effect in Bom H C (referred to above) but there "succession" was "succession" as understood by the Charter. The Hindu Wills Act does not apply to Cutchi Memons. See *In re Haji Ismail Haji Abdula*[2] There is no authority which allows them to create estates unknown to Mahomedan Law *e.g.*, conditional gifts As far as revocation is concerned the law is the same to both Hindus and Mahomedans

As regards the second deed —It gives a life estate to Jairajbhai which we are not concerned in disputing After certain legacies he gives the whole residue to his two sons as undivided members of a Khoja family We say that that simply means that they are to take as if he died intestate. Curiously enough Noor Mahomed transferred all the properties in his own name as if they were ancestral properties This is important on the question of limitation. *Bai Diwali* v. *Patel Bechardas*[3], is not, we submit, good law *Radhabai* v. *Nanarav*[4], *Venkayyamma Garu* v *Venkataramanayyamma Bahadur Garu*[5], *Yethirajulu Naidu* v *Mukunthu Naidu*[6]. Jairajbhai opened separate books of account in respect of these properties and later on signed rent bills as managing trustee. Noor Mahomed did the same, he had fifteen of the properties transferred to his own name, three properties could not be transferred as they were Fazendari.

The will of 1881 was never acted upon as regards the various legacies. Noor Mahomed joined one of the trust properties with his own and built a bungalow on the two treating the lands as if they were his own. *Jainabai* v *R. D. Sethna*[7] is good law and as pointed out therein if such gifts *in futuro* with a

(1) (1894) 20 Bom. 53.
(2) (1880) 6 Bom 452.
(3) (1902) 26 Bom. 445.
(4) (1879) 3 Bom 151.
(5) (1902) 25 Mad. 678.
(6) (1905) 28 Mad. 363.
(7) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

life interest to the settlor are allowed you do away with the limitation of willing away only ⅓rd of the property.

The only point left is Limitation. The onus is on the defendants but first how can there be any adverse *possession* when the real owner is in possession of the property. No man can be said to hold property adverse to himself. At least that was the case in Jairajbhai's time and also in Noor Mahomed's. The plaintiff was a minor and brought a suit within a year or two of attaining majority. Then again we rely on section 10 of the Trusts Act. A Khoja has testamentary capacity to will away the whole of his property. *Advocate-General* v. *Karmali*[1].

Bahadurji, for the Trustees defendants 1—4 :—

We submit that the trust deed is valid and that everything which the law requires was done to transfer possession Possession must be given as the subject of the gift admits of: *Khajooroonissa* v. *Rowshan Jehan*[2]. In this case on the day of execution Jairajbhai opened separate books of account Did he retain possession as owner of the property or as trustee? From the books it is proved that he managed the properties under the trust deed which provided that he should be the managing trustee. *Mullick Abdool Guffoor* v. *Muleka*[3], *Shaik Ibhram* v. *Shaik Suleman*[4], *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*[5]. Jairajbhai acted as banker to the Trust Estate. After Jairajbhai's death Noor Mahomed was appointed managing trustee by a Trustees' Resolution of 1st August 1887 and after his death Sir Currimbhoy was appointed managing trustee Amir Ali's Mahomedan Law, 3rd Ed., Vol. 1, p. 64 *and* p. 49. *Sheikh Muhammad* v. *Zubaida Jan*[6]. The fact that the properties were not transferred in the Collector's books makes no difference and does not affect the validity of the trust-deed · *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*[6]; Bombay Act II

(1) (1903) 29 Bom. 133 at p. 148.
(2) (1876) 2 Cal. 184.
(3) (1884) 10 Cal. 1112 at p. 1123.
(4) (1884) 9 Bom. 146.
(5) (1905) 29 Bom. 468.
(6) (1889) L. R. 16 I. A. 205.

of 1876, section 30 We submit the whole trust deed is valid; Amir Ali, Vol. I, p. 27. Wilson's Mahomedan Law, p. 353.

[*PER CURIAM* :—There are really two points for you to argue. First :—Is the gift *in futuro* valid? And second :—Is the deed revocable?]

Nawab Umjad Ally Khan v. *Mussumat Mohumdee Begum*[1], *Umes Chunder Sircar* v *Mussummat Zahoor Fatima*[2] followed in *Banoo Begum* v *Mir Abed Ali*[3], Amir Ali 3rd Ed., pp. 26, 79, 111, 126, Baillie's Digest of Mahomedan Law, Chapter III of Book IX, Wilson's Anglo-Mahomedan Law, 2nd Ed., p. 491.

Whether the annuities to the ladies in the trust deed are valid. See Amir Ali p 80, Wilson's Mahomedan Law, p. 475, section 181 (*b*). As to whether the powers to revoke is valid, a settlor has the power to revoke under certain conditions. See Wilson, p. 366, section 316 Here the donor had no power to revoke the gift therefore the plaintiff cannot ask the Court to revoke it on the point of Limitation. See *Churcher* v. *Martin*[4], *Cowasji* v. *R. D. Setna*[5], Limitation Act, section 9, *Sreemutty* v. *Hurrykristo*[6], *Vira Pillay* v *Muruga Muttayan*[7].

Tyabji for defendants 13, 17, 18 :—

All gifts in Mahomedan Law are revocable. Morley's Digest, p. 277. He also referred to *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum*[1], *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*[8], *Muhammad Faiz Ahmad* v. *Ghulam Ahmad Khan*[9], *Anwari Begam* v *Nizam-ud-din Shah*[10].

Inverarity in reply.

BEAMAN, J.—I will take the questions material to be answered in this suit separately and in order of their difficulty and importance.

(1) (1867) 11 Moo. I. A. 517.
(2) (1890) L R 17 I. A 201
(3) (1907) 32 Bom 172
(4) (1889) 42 Ch D. 312 at p. 319
(5) (1895) 20 Bom 511.
(6) (1868) 10 W. R 285.
(7) (1865) 2 Mad H. C R. 340.
(8) (1889) 11 All. 460.
(9) (1881) 3 All. 490.
(10) (1898) 21 All. 165.

1911

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM

First of Limitation. The trustees contend that the plaintiff is now barred by the lapse of time from bringing this suit to have the trust-deed of the 7th of January 1886 set aside. Involved in this question is the application or otherwise of section 10 of the Limitation Act Further, whether in the event of their being adverse possession, time commenced to run in the life-time of the settlor Jairajbhoy Peerbhoy.

It appears clear that it is only in the event of the trusts or some of them being bad, that the question of limitation can arise. For, if the trust-deed in its entirety is good, then of course effect must be given to it irrespective of any question of the lapse of time

Next, is to be considered the somewhat more complicated question of how limitation arises when the trust-deed itself is bad and void *ab initio* or when the deed itself is good, but all or any of the trusts declared in it are bad It is upon this point that a certain amount of difficulty appears to have been occasioned by Courts in this country Applying the decisions in *Churcher* v *Martin* (1) and *In re Lacy* (2), to sets of facts to which, with great respect to the learned Judges responsible for some of those decisions, I may doubt whether the principle of *Churcher* v *Martin* really applies All the English case-law on this subject appears to me, and has appeared to me, from the moment I commenced to study and analyse it, perfectly consistent and intelligible Stating the effect of that law in the most general terms, it amounts to this, that where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession, believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by trespass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trust declared are in themselves wholly or partially bad, then there is a resultant trust over to the author of the trust and the

(1) (1889) 42 Ch. D 312 at p. 319.

(2) [1899] 2 Ch. 149.

1911.

CASSAMALLY JAIRAZBHAI v. SIR CURRIMBHOY EBRAHIM.

possession of the trustees, whatever they may think of it and however they might intend to use it for the purposes of carrying out the bad trusts, could not in law be adverse to the *cestui que trust*, that is to say the grantor. In all cases like *Churcher* v. *Martin*[1] and *La*[illegible][2], the possession is referable in law to the [illegible] The so-called trustees never were trustees except in name [illegible] without any authority from the author of the [illegible] legal relation having been established [illegible] Widely different is the case of trustees who obtain the legal estate from the author of the trust [illegible] beneficial uses to specified objects which [illegible] for then from the beginning there [illegible] a relation between the author of the trust and the trustee in whom his confidence has been reposed and there [illegible] the legal possibility at least of another relation coming into existence between them where owing to the failure of the declared trusts there is a resultant trust back to the grantor who from that moment becomes in law the *cestui que trust* of the trustees. When the principle is thus stated, it appears so clear and so intelligible that it is not very easy to understand how it has been extended, or appears at any rate to have been extended, in the Indian Courts so as to cover cases where the trustees were not in as trespassers but in all strictness as trustees and afterwards in the events which had happened not as trustees for the intended *cestui que trust* but for the grantor. It is true that there are passages in the judgment of Kekewich J. in *Churcher* v. *Martin*[1], which have contributed to what, if I may say so with respect, seems to have been some confusion of thought in the Courts of this country. Particularly that passage which is quoted in more than one judgment to which I have been referred, where that learned Judge asks how the possession of the trustees can enure to the benefit of the grantor whose title it was the intention of the trust settlement to defeat. Some words in that passage might be thought not to have been quite happily chosen, for it is of the essence of the decision that there were no trustees but that in fact

(1) (1889) 42 Ch. D. 312. (2) [1899] 2 Ch. 149.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM

those who were at first so-called, turned out to be trespassers. Nor does it appear to me that when the analysis is carried further, it is really a question of the possession of the trustees enuring for the benefit of the grantor. It is, however, no answer to this difficulty to say that in the present case the grantor could have had no intention of defeating the interest or title of the present plaintiff because at the time of the trust settlement the plaintiff was not born That is a pure irrelevancy in the abstract argument But were it necessary to do so, a critical examination of all the contents of the judgment in *Churcher* v. *Martin*[1], might lead to some doubt whether were all that is implied in Kekewich J.'s reasoning, pushed to its logical conclusion, even that decision could be in all respects reconciled with established principles of other branches of the law. It is a peculiarly difficult case, used merely to elucidate the principle on which it purports to be founded for the same reason that this is a difficult case, namely, that there the residuary legatee, as here the original grantor, was one of the trustees and with reference to that Kekewich J. does say that the case might have been very different if Emanuel Churcher, who, for the purposes of that case, stood in the position of the original grantor, had been the sole trustee. And that, I think, for a very obvious reason, which on account of the difficulties it might have created, the learned Judge did not care to exhaust. For it surely must always be a matter of extreme doubt whether, carrying the fictions of law to their utmost legitimate length, a man can be said to be a trespasser upon himself. Remembering the basis of that judgment, the learned Judge had to surmount this difficulty by taking it for granted that its form was changed in some way by the fact of there being three trespassers and not one. But since it appears that it was Emanuel Churcher himself who retained the physical possession and took a chief part, if not the chief part, in dealing with the property, it certainly does seem a hard saying that in the character of a trespasser he could have obtained possession adverse to himself. In *Lacy's Trusts*[2], the principle of

(1) (1889) 42 Ch. D. 312. (2) [1899] 2 Ch. 149.

Churcher v. *Martin*[1], is brought out in the clearest light and freed from this particular complication. When these cases are compared with such cases as *Lister* v. *Pickford*[2]; *Salter* v. *Cavanagh*[3] and *Patrick* v. *Simpson*[4], the distinction in principle between these groups becomes perfectly clear. In such a case as *Salter* v. *Cavanagh*[3], which is a very favourite authority in the Courts of India, there was a trust of the whole property for uses which did not exhaust the revenues and it was held that in respect of the unapplied surplus there was an express trust inferable from the instrument itself in favour of the settlor. Kekewich J in *Churcher* v. *Martin*[1], comments upon that, that it is sufficient to say that the trust, whatever else it may have been, was not express in the technical sense of that term.

The point becomes of importance when we have to consider the case law upon s 10 of the Limitation Act and the applicability or otherwise of that section to the trustees' contention here. Nevertheless, it may be doubted whether in the broader etymological sense, it is not quite correct to say, as Lord Halsbury very emphatically said without any qualification in *Smith* v. *Cooke*[5], that where it was the intention that there should be an ultimate resultant trust in favour of the grantor, it was usual to express that on the face of the deed, which means much the same, as was held in *Salter* v. *Cavanagh*[3]. That dictum of Lord Halsbury excited a considerable amount of criticism in technical circles where all equity lawyers maintained that it was a contradiction in terms to say that a resultant trust could or ought to be expressed in the deed. As I have said, in the less technical and more general sense, it is probably correct to say that a deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express and a resultant trust. But if I had been confined to the English authorities, I should certainly have not felt it necessary to do more than state in the plainest

(1) (1889) 42 Ch. D 312.
(2) (1865) 34 Beav. 576
(3) (1838) 1 D. & W 668.
(4) (1889) 24 Q. B. D 128.
(5) [1891] A. C. 297.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

language what I conceive to be the true meaning and applicability of such cases as *Churcher* v. *Martin*[1] and *Lacy's Trusts*[2].

It cannot, I am afraid, be denied that in considering pleas of limitation in cases analogous to this, the Courts in India have given decisions upon section 10 of the Limitation Act, some of which profess to be founded on *Churcher* v. *Martin*[1], which do occasion very great difficulty and are extremely hard to reduce to simple and consistent principles.

The form in which the question has usually presented itself to the many learned and eminent Judges who have dealt with it in this country, is whether a resultant, implied or constructive *cestui que trust* is entitled to the benefit of section 10 and with perhaps a single exception of the case in *Maulvi Saiyid Muhammad* v. *Razia Bibi*[3], upon which I will say a few words in a moment, the current of authority seems to have set steadily against the extension of that section to all cases of resultant implied or constructive trusts It is no use shirking the difficulty which this body of case law gives rise to. For involved in all those decisions, even where they do not go the length of expressly affirming it or giving effect to it as the result of that proposition, is the assertion that the possession of a trustee in all such cases of resultant, implied and constructive trusts may be and sometimes is adverse to the *cestui que trust*. The strongest case perhaps is that of *Kherodemoney Dossee* v. *Doorgamoney*[4], where it is perfectly clear that there was, in the events found to have happened, a resultant trust in favour of the plaintiff. But the learned Judges held that the trustee, notwithstanding the failure of the declared trusts, was in possession for and on behalf of the intended beneficiaries and against the resultant *cestui que trust*. That case is, as far as I can see, exactly upon all fours with the present case.

In the case of *Vundravandas* v. *Cursondas*[5] a Division Bench of this Court, consisting of Sir Charles Farran, Chief

(1) (1889) 42 Ch. D. 312.
(2) [1899] 2 Ch. 149.
(3) (1905) L. R. 32 I. A. 86.
(4) (1878) 4 Cal. 455.
(5) (1897) 21 Bom. 646 at p. 603.

Justice, and Tyabji, J., would apparently have come to the same conclusion. That decision would undoubtedly have been binding upon me, whatever my own views as to the law involved in it might be. Fortunately, however, the passage in point is clearly in the nature of an *obiter dictum* and when the case went up on appeal to the Privy Council, it might, I think, be fairly inferred from the line of argument there adopted and the reiterated reference made by Lord Macnaghten to *Lyell* v. *Kennedy*[1] that their Lordships were not disposed to adopt that part of the lower Court's judgment. However that may be, they certainly do not adopt it and part of the judgment appears to have been reversed. So that beyond the very high respect each and every other Judge must always feel for any opinion expressed by the late eminent Chief Justice Sir Charles Farran, that part of the judgment is not binding upon me.

In a case decided by my brother Batchelor in 1906 *Mathuradas* v. *Vandrawandas*[2], that learned Judge, who is habitually averse from indulging in *obiter dicta*, allowed himself under the influence of what must have been very able and impressive argument to express his opinion upon this point, the whole of that part of his judgment is entirely *obiter*. It is not in any sense binding upon me but it contains an elaborately reasoned examination of the authorities upon this point and indicates that that learned Judge's opinion coincided with and would, if necessary, have been given in support of the judgment of the Calcutta Court to which I have referred.

Those cases will suffice to explain the difficulty I have felt throughout this part of the argument in arriving at some clear and settled principles upon which to ground my own decision upon this issue. Not that I myself, had I not been oppressed by so much authority emanating from Judges much more eminent than I can ever hope to be, should have felt at any time any real difficulty as to the proper *ratio decidendi*.

And first of the argument which is constantly repeated in all these judgments as distinguishing what is called an express trust inferable on the face of the deed from a true resultant

(1) (1889) 14 App. Cas. 437. (2) (1906) 31 Bom. 222.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

trust only coming into being because of the failure of the trust declared in the deed. Here, I think a very little examination will bring to light a perfectly clear and consistent principle, and that principle has already been announced and adhered to in more than one judgment of this Court. The two hypothetical cases which Mr Inverarity offered me in the course of his concluding argument appear to me to entirely overlook it Those two cases were of a trust, let me say, for a thousand pounds to the uses of so much blank for A, so much blank for B, so much blank for C Here, said Mr Inverarity, there is an express trust of the kind intended in *Salter* v. *Cavanagh*[1], and though that case was not referred to in *Smith* v. *Cooke*[2], clear upon the face of the deed. Then, let us take a trust of one thousand pounds, one pound to the use of my daughter and 999 pounds undisposed of. Upon what conceivable principle, Mr Inverarity asked, can you distinguish between these two cases and say that in one there is an express trust over to the settlor and in the other there is not. It appears to me that there is no difficulty whatever in answering that question In the first of the cases there is a true resultant trust not express upon the face of the deed but merely implied by law as Kekewich, J , put it, not because the deed is void certainly but because of the failure of the intended trusts. If those trusts had not failed and had exhausted the property, there would have been no resultant trust over to the settlor and therefore there is nothing express on the face of the deed which would bring it within the same category as the second case In the second case the intended trust can be carried out consistently with what is then said by Lord Halsbury to be an express trust on the face of the deed over for the benefit of the settlor and the criterion is equally plain and infallible. Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed but where the extinction or failure of all the intended trusts is a

(1) (1839) 1 D. & W. 668. (2) (1891) A. C. 297.

condition precedent to the resultant trusts coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed.

In a recent decision of this Court *Mogilal v. Gaurishankar*[1], Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor, following a part of the decision of Sir Charles Farran in *Vundravandas's case*[2], have re-affirmed the principle I have just stated. There, there was a small trust not exhausting the residue and the trustees were held to hold the residue on express trust for the heirs of the settlor. That of course is merely a restatement of the rule in *Salter v. Cavanagh*[3].

Having so far cleared the way from all possible misconceptions upon this head, let me now come to the heart of this particular difficulty and deal with a case like that of *Khoodeemoney Dossee v. Doorgamoney*[4]. If that decision is really good law, then it would appear to exactly fit the facts of the present case with this difference only that the author of the trust was not, if I remember rightly, trustee in that case. The Court there held, founding itself upon the principle of *Churcher v. Martin*, that on the failure of the declared trusts, which were in favour of children then unborn, the trustee, having gone into possession under the trust-deed, held adversely to the author of the trusts and his heirs, more than twelve years having elapsed before the heir sued to have the trust declared void and recover the fund. Notwithstanding that the Court did hold those trusts void, it refused to grant the plaintiff relief on the ground of limitation. The resultant trust, when the declared trusts failed, was held not to be a trust vested in the trustees for a specific purpose within the meaning of section 10 of the Limitation Act, and from that time forward our Courts have interpreted that section as though the words were an express trust as in the English Statute.

Now it appears to me that the true law underlying all sets of facts of that kind was never presented to the minds of the learned Judges who decided that case, or, as far as I can see,

(1) (1910) 12 Bom. L. R. 947.
(2) (1897) 21 Bom. 646.
(3) (1838) 1 D. & W. 668.
(4) (1878) 4 Cal. 455.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

has been considered in any of the numerous judgments which have been delivered in Indian Courts professing to follow it. What is the true position when declared trusts failed and there is a resultant trust over to the settlor or his heirs? The answer to this is to be found in the very elementary proposition that the possession of the trustee is always that of the *cestui que trust*, and, therefore, however, he may think or wish to be holding as trustee for trusts which have failed in the eye of the law, he is really holding, when those trusts failed, as trustee for the settlor. Then the position is simply this: so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder, for two claimants, the intended beneficiaries of the declared trusts which have failed and the resultant trustee, that is, the settlor. And I entirely fail to understand how any length of possession by a trustee so situated can be adverse to his true *cestui que trust* as soon as that legal person is discovered and ascertained. It is quite easy, I admit, to conceive of cases in which a trustee so situated might deny the right of the *cestui que trust* resultant on demand made. It is quite conceivable that in his partiality for the intended objects of the author of the trust's bounty, he should make over the legal estate to them. And there are many ways in which he might, divesting himself of the purely legal character of a trustee, thus put himself in direct opposition and hostility to the resultant *cestui que trust*. And I can also understand that if there were facts showing that this had been done the character of the trustees' possession might be affected by such facts and time might be deemed to run as from the first of them against the *cestui que trust*. Then indeed it would be a very serious question how far these decisions governing the application of section 10 of the Limitation Act might not preclude the resultant *cestui que trust* from obtaining relief when twelve years had elapsed from the time that he knew his trustee had been holding adversely to him.

This leads me to what is the fundamental distinction to be borne in mind when the argument turns, as it has turned here, upon section 10 of the Limitation Act. That section provides that in the case of an express trust no length of time shall bar

a suit by any person following a trust property in the hands of a trustee I have used the word "express" following the decisions of the Indian Courts, and so adopting with the utmost reluctance the narrow view to be placed upon that section I still say that it really does not touch the point I have to consider in this case From the very nature of the section it implies that in some way or other the possession of the trustee has become adverse to his *cestui que trust* Else there would be no need for it in the statute of limitation And there are many cases in which that section might have its practical use, for instance, a dishonest trustee might make off with the whole of the trust fund or deal with the trust property in a manner incompatible with its application to those uses for which alone he was entrusted with it and from that moment no doubt his possession would cease to be really that of a trustee and would become adverse to his *cestui que trust*

Now, where a trust is express, section 10 says that even though the *cestui que trust* chooses to put up with the acts of a trustee and to take no steps to recover the trust property for more than twelve years, yet he shall never be barred when he does so choose to pursue and endeavour to recover it But apparently where the relations between the trustee and the *cestui que trust* are not express but have arisen by implication of law only, then if the trustee assumes an adverse attitude towards his *cestui que trust*, the *cestui que trust* must seek his remedy within the period of twelve years That I take to be the utmost length to which the Indian cases upon this head can fairly be carried and even then, speaking with the utmost deference, I think, they have been carried much too far But that begs the whole question whether or not in the absence of any dishonesty on the part of a trustee, his possession can really be adverse to that of his true *cestui que trust*, as soon as any conflict between persons so claiming has been decided. And that is very like one of the early English cases where one of the *cestui que trust* appears to have been put into possession of a property and to have had the use of it but it was afterwards found that the real *cestui que trust* was another and limitation was not allowed.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Now I say that in all cases like that of *Kherodemoney Dossee* v. *Doorgamoney*[1], it will not do for the trustee to say that he would prefer to hold the property to the uses intended by the trust-deed when it is found that those declared trusts are invalid. What has in law happened is that throughout he has been holding as a resultant trustee for the *cestui que trust* and until there has been some material change in the character of the trustee referable to his knowledge of his changed relations and unmistakably adverse to his true *cestui que trust*, I really do not see how any question of adverse possession can possibly arise. So that we may give the go-by in a case of this kind, if my view is correct, to section 10 entirely and treating the case as falling under Articles 141-142 of the Second Schedule, merely put the question whether the possession had been adverse and if so from when

In the present case the trust was executed in 1886. For the purposes of my present argument it is immaterial whether it was a good trust or a bad trust, provided only that the deed itself was good and as to that there can, I think, be no question The learned counsel for the trustees, who has argued the question of limitation very fully, has not attempted, as far as I can remember, to suggest that there was anything bad in the deed itself or that it failed to convey the legal estate. At that time the plaintiff was not born. About a year after the execution of the trust-deed the settlor died, the plaintiff being then in existence Up to his death the author of the trust was himself one of the trustees and was in physical possession, occupation and enjoyment of all the trust property. I do not, however, think that that fact has any bearing whatever upon the theoretical argument I have so far unfolded If there really were any adverse possession, it must have commenced from the moment the legal estate was conveyed and taken possession of by the trustees. Nor is that in any way affected by the fact that one of the trustees happened to be the author of the trusts and the first beneficiary, for I take it to be as clear as day-light that if in such circumstances a donor

(1) (1878) 4 Cal. 455.

1911.

CARRAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

chooses to divest himself of his property as donor and accept it as donee, interposing the fictional character of trustee between himself and those two characters, then so far as he is a donor, but as trustee for himself as donee, must hold adversely to himself as donor. Nor can I see that this position is in the slightest degree affected by the conveyance itself originating from himself as donor. For if there were any adverse possession at all, I do not see why it should not begin to run under a conveyance just as it would do in the case of a purchaser against his vendor, once the conveyance be completed

I make these observations because it seemed to me in the course of the argument that the learned counsel for the plaintiff attached very great importance to the fact of Jairajbhoy Peerbhoy having remained in physical possession and enjoyment of the property during his lifetime. As I have said, if this were really a case like *Churcher* v. *Martin*[1] and if I had been obliged to treat all the so-called trustees as mere trespassers *ab initio*, then I certainly should have felt strongly inclined to press Kekewich J.'s reasoning to its logical conclusion and hold that a man cannot really be a trespasser upon himself upon his own property. So that in that view I should have felt very grave doubt whether any adverse possession could possibly have originated in the lifetime of Jairajbhoy Peerbhoy, but the deed being perfectly good, those considerations do not apply.

Now the trusts are all on the face of them of a kind which an honest trustee might accept and endeavour to carry out, so that I think there possibly arises a further point, namely, whether limitation as against a resultant trustee could commence to run until the question whether or not the declared trusts were good or bad, had been decided. And if that were really so, then in a case of this kind, there could obviously be no question of limitation at all For it is only after the Court has pronounced some, at any rate, of the declared trusts to be bad that it could arise and then as I began by saying the trustees would have to fall back upon limitation as against one who to

(1) (1889) 42 Ch. D. 312.

1911.

CASSAMALLY JAIRAJBHAI
v.
SIR CURRIMBHOY EBRAHIM.

that extent is attacking the trust-deed. Until this case is finally decided, I suppose it cannot be known whether the trusts of the settlement of 1886 are good or bad, so that the relation of the resultant *cestui que trust* and trustee has not been established between the plaintiff and the defendants until the final determination of this suit. I do not mean to say that when that relation is established, it would not of necessity go back to the moment when any or all of these declared trusts failed but for the purposes of limitation I do not see how the possession of the trustees can be said to be adverse until so uncertain a question had been answered

Before the case concluded, I was asked to grant an adjournment more than once by the learned counsel for the plaintiff in order that he might bring further proof of the alleged unsigned will of Jairajbhoy Peerbhoy and he appeared to think that if he could prove that unsigned will, it would have a direct bearing upon this question of limitation I think by what I have already said I must have made it clear why I do not agree with that view If as a matter of fact the possession of Jairajbhoy Peerbhoy taking as trustee under his own trust settlement were adverse to himself as donor, no act purporting to be performed by himself as donor could have any bearing at all upon the character of his possession as trustee. It is absolutely necessary in a nice theoretical argument of this kind to keep the personæ of the same man separate and distinct in one's mind We have Jairajbhoy the donor, Jairajbhoy the trustee, Jairajbhoy the *cestui que trust*, and referring each of Jairajbhoy's acts to its proper persona it will, I think, be apparent that no act done merely in his capacity of Jairajbhoy the donor could possibly affect the adverse possession of property held by him as Jairajbhoy the trustee for Jairajbhoy the donee. There is only one connection in which the proof of this will might possibly have served the plaintiff as against the trustees and that as a revocation of the trusts, if the trusts itself were otherwise good. But that is entirely distinct from the question of limitation.

Before I conclude my discussion of this topic, I would say a word or two upon the case of *Maulvi Saiyid Muhammad* v.

Razia Bibi[1], which is the nearest, I can find, to direct authority in favour of the conclusion I myself have come to.

That was a case the facts of which very closely resembled the facts of the present case. There was a trust with an ultimate gift to *wakf* and in the meantime the property was to be applied to the uses of the settlors and their descendants. Pursuant thereto, professedly taking under this alleged *wakf*, one of the trustees occupied and held the property, then the other settlor died and on her daughter making a claim to her mother's share of the settled property, it was held that the *wakf* was bad for various reasons into which I need not go and the question then arose whether the plaintiff was not barred by adverse possession of the so called *Mutawali* under the *wakf* settlement The point was treated in the Allahabad High Court as a pure question of fact, namely, whether or not, the possession of the defendant was adverse. And their Lordships held there that it was merely permissive without going into any of the nice and difficult questions which I have had to open up in this case Unfortunately I think—for we badly need an authority on the question,—their Lordships of the Privy Council satisfied themselves with saying that they saw no reason to dissent from the correctness of the conclusion of the Court below upon this point, that is to say, they found that as a matter of fact the defendant's possession was permissive and not adverse. But they do not appear to have gone into the question whether in any event, while the normal relation of trustee and resultant *cestui que trust* exist in law, the possession of the former could be adverse to the latter It is really upon that ground and that substantial ground alone that I base this part of my judgment. I am quite clear in my own mind that so long as a trustee occupies the position of a trustee as soon as declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui que trust* and can only be changed into adverse possession by a conscious and deliberate act; that is to say, that he

(1) (1905) L. R. 32 I. A. 86.

1911.

CASSAMALLY JAIRAJBHAI *v.* SIR CURRIMBHOY EBRAHIM.

must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court had declared or which are known to him to have failed Then I do admit that his possession might become adverse to his legal *cestui que trust* and that if that person did not take steps within twelve years, he might not be able to avail himself, under the Indian authorities, of the provisions of section 10 of the Limitation Act. But in this case nothing of the kind has happened and nothing of the kind could have happened, for the plaintiff through most of the intervening period has been a minor and as soon as he came of age, he appears to have contemplated taking steps which had resulted in the present suit, so that until the trustees became aware—I am assuming for the purpose of the whole of this argument that the trusts are bad,—that the trusts were bad, I think as a matter of fact it is too clear to admit of serious argument that they were not holding adversely to him who would then be the resultant *cestui que trust.* That, I believe, is in conformity with all the English authorities. I believe too that it states a principle which will enable us to reconcile all the Indian authorities upon section 10 with what has really been meant in the English authorities and so I trust that we may come to a clear understanding of what really is implied in this branch of the law which has been clearly understood and always clearly stated in the English Courts but which has in this country, I think, given rise to some confusion and divergence of opinion.

I, therefore, find upon the first question that in the event of the trusts being bad, the deed is good and that the plaintiff is not time-barred as against the trustees.

The next question which I shall answer in a very few words is whether or not the whole of this suit is *res judicata* by reason of certain arbitration and other proceedings between the plaintiff of the one part and Nur Mahomed and after his death his widow Khanubai of the other. The trustees disavow their reliance upon this point which certainly is more proper to the case of the seventh defendant Khanubai who has, in the course

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

of the suit, settled with the plaintiff. If it were a good plea, it would no doubt defeat the whole suit and to that extent support the trustees' position. I think, therefore, it ought to be at least disposed of. There can plainly be no *res judicata* touching the subject matter of this suit and looking to the array of parties in it by reason of the proceedings I have adverted to, I think it is extremely likely that had Khanubai continued to defend the suit, there might have been something very like an estoppel which in that event, I should have pressed as far as I lawfully could against the plaintiff in her favour But estoppel and *res judicata*, as I have so frequently had occasion to say from this bench, are entirely distinct Put in the most simple and colloquial way, *res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another. And I have never heard of a suit being barred by estoppel except perhaps in the recent case of the *Narielwala's* Trusts, where, I rather think, the learned Judges in appeal did incline to hold that the plaintiff was estopped from bringing his suit. It is also quite common in all text-books upon estoppel to find a very large portion of their subject matter devoted to *res judicata* I think the distinction is really too plain to need dwelling upon in the present case What passed in the arbitration and other proceedings I have referred to, was matter in issue between the plaintiff and his brother Nur Mahomed. The present trust settlement was excluded by design from the scope of any decision arrived at in that suit. I do think it very likely that it was a factor nevertheless in the composition arrived at and that it might have been capable of proof, that it was on the understanding that the trust settlement was not to be attacked that the arbitrators made their award: and if that really had been so, then the position might have been awkward for the plaintiff in the present suit had Khanubai continued to defend it. But such an estoppel, if it existed, would have been restricted to Khanubai and the trustees could not have availed themselves of it. This is however happily now merely a matter of conjecture. As a bare plea of *res judicata* it is obviously unsustainable. I take this

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

opportunity of congratulating the legal gentlemen who have had the interests of Khanubai and Sakinabai in their care upon what I consider the very advantageous terms upon which they have provisionally settled with the plaintiff.

I now come to a consideration of what is perhaps the principal question in the case, whether the trust settlement of 1886 is a good and valid settlement, that is to say, whether the disposition of property thereby made is a good gift according to the Mahomedan Law. And in dealing with that I must observe that there are numerous gifts contained in this settlement, some of which might be good while others might be bad, so that it may not be possible to dispose of the settlement as a whole without going somewhat minutely into its several parts.

Let us first look at the nature of the settlement itself. It purports to convey the trust properties therein mentioned on trusts to certain trustees first for the use and benefit for life of the settlor and first donee Jairajbhoy Peerbhoy himself with monthly sums to certain ladies of the family with which I am not now concerned. On the death of the settlor, like interests to Nur Mahomed who was at that time his only son. In the event of Nur Mahomed having a son, there was to be a re-arrangement in respect of all that follows in this settlement, into the details of which again I need not go. But *failing* male issue to Nur Mahomed, then the corpus was to be divided into ten portions which were given to various donees, four-tenths being directed in that event to charity. And the question is—a very important question, I think, in this town—whether a voluntary settlement during the lifetime of a Khoja Mahomedan of this kind is a valid gift, or if not a gift, whether it is a will, or if not a will, whether it is a *wakf* and in either of the latter characters good and valid. At the end of the settlement deed there is the usual revocation clause appropriate to all English voluntary settlements in common form. Thereunder the settlor or the donor reserves to himself full power of revocation during his lifetime by signed writings and also power to declare new trusts by such signed or any other writing.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

I must take this opportunity of saying that when the case opened, it appeared to me to resemble, for the purpose of deciding this issue, the case of *Jainabai* v. *R. D. Sethna*[1] so very closely that I doubted whether I should be called upon to do much more than re-affirm my decision in that case. But the particular question in *Jainabai* v *R. D. Sethna*[1] was whether the alleged gift was revocable. In that case the donor did exercise the power of revocation reserved in his lifetime and therefore the central point in that case differs materially from the central point in this case and a great deal of the judgment there has reference to arguments which were more peculiarly apt for the main purpose the plaintiff then had in view. And upon a much fuller argument and somewhat extended researches of my own into the Mahomedan Law I have reason to doubt whether I did not lay down that law in one or two points much too broadly, in *Jainabai's* case[1]; and whether indeed part of that judgment is not incorrect. I say this particularly with reference to what I then held on the reply that the deed was a *wakf*. I was then of opinion that a *wakf* could not be valid if it were postponed to a life interest in the person creating it.

Now, having gone into the standard works upon the Mahomedan Law and listened to a very long and elaborate argument addressed to me by Mr. Tyabji for some of the defendants in this case, it does appear to me to be inconsistent with that law that a Mahomedan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of the property So that I doubt whether it would be correct to hold, as I held in that case, that if the instrument were really a declaration of a *wakf*, it would be necessarily invalid because the *wakf* was postponed to a life enjoyment of the donor and possibly, though this is by no means so clear, to other life interests after his own.

Next, in that judgment I was of opinion, looking to the broad essential features of what the Mahomedan lawyers understood as gift that it would be sufficient to invalidate a

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

gift, if the donor in the deed purporting to confer it, reserved to himself a right of revocation co-extensive with his life. And if there were any hope of expecting from the vast entanglement of the Mahomedan Law anything like consistent principles or intelligible classifications or accurately expressed notions, it certainly would appear to me that considering the requisites of a gift are amongst others finality and completeness *in præsenti*, then it might and ought to follow that an announcement on the donor's part that he might at any time during his life-time, revoke the gift would make the donation entirely invalid So far from this being the case, Mr. Tyabji points out, and I believe he is perfectly correct, that the general rule is that the power of revocation is inherent in the donor of every gift, so that expressing it, as is usually done by English draftsmen in these voluntary settlements, is merely surplusage and so far from invalidating the gift as a whole would necessarily be implied in it were it not expressed. It is true that this general rule like everything else in the Mahomedan Law which has yet come under my analysis, is open to innumerable exceptions many of which appear to conflict in principle with the main rule And it is a very strong point in the defendants' case here that although there is an express power of revocation reserved in the settlement and although the power of revocation is implied generally in all gifts, yet where the gifts are to particular persons or where the donor has received from the donees anything in exchange for the gift or part of the substance of the gift itself, then according to the strict Mahomedan Law the gift is irrevocable and the revocation clause in this settlement would have to be regarded as void.

Upon those two questions, I say, I think that my judgment in *Jainabai* v. *R. D. Sethna*[1] would require to be re-considered. But the more frequently I hear arguments upon Mahomedan Law and the further I prosecute my own researches in that somewhat difficult region, the more convinced I am that it is almost impossible in the state of the existing authorities compared with the original text-book writers and standard works

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

on the subject, to arrive at any clear understanding of what the real underlying principles of that law upon many of the questions which in an advanced civilization have large and practical importance and are supposed to be answered by a reference to that law, really are The English Courts are constantly making Mahomedan Law for themselves and engrafting upon the extremely crude and primitive notions of the early Mahomedan lawyers, the artificial conceptions of the English law and so endeavouring to mould and shape the whole into a somewhat practical form, which while it may flatter the conservative prejudices of good Moslems, does not in the least resemble anything which the authors of the Moslem Law had themselves laid down; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions with their now highly complex social needs and requirements.

I say this to explain with what diffidence I always approach the solution of any question which has to be argued before me first with reference to the Mahomedan Law proper and next with reference to the judge-made authority upon that law. And if I failed in the case of *Jainabai* v. *R. D. Sethna*[1], as I believe I did, to go far enough afield and take into account many very subtle differences and exceptions to be found in the Mahomedan Law books I am very much afraid that even in the present case where the arguments have been much fuller and where I myself have gone much deeper into the original works I may again fall into error. I shall not therefore start criticizing this deed with the assumption that it is necessarily bad because of the power of revocation reserved to the donor in it. I still think that if analysis were pressed far enough, that ought to be a complete answer to the validity of any Mahomedan gift *inter vivos* but assuming that it is not, then I have to look to the nature of the gift or gifts which this deed purports to make. To the first of these, that is the gift to the donor himself, I do not

(1) (1910 34 Bom 601.

1911.

JASSAMALLY
AIRAJBHAI
v.
SIR
CURRIMBHOY
EBRAHIM.

think that any serious exception either in theory or practice can be taken, except this that it is entirely meaningless. I am not now overlooking the fact that while the gift reserves full beneficial enjoyment of the settled property to the settlor for his life, it might be said that it is not meaningless inasmuch as it curtails his power of disposition and therefore that is giving to himself something less than he possessed before. That appears to me to make it still more meaningless. How a person can give to himself less than he had in the ordinary sense of gift, I confess I fail to understand. Moreover, there are a great many passages in the most highly accredited works on Mahomedan Law to show that where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void. So that if there seem any useful purpose to be served by trying to apply the principles in this region of the law we might say that however restricted be the gift in form to Jairajbhai, it is in effect a gift absolute to him for life and that entirely irrespective of the power of revocation in the concluding clause. So far as his life estate is concerned, however, it is unnecessary to be too nice in discussing or criticizing it except in so far as it might possibly invalidate all that follows And in the case of *Jainabai* v. *R. D. Sethna*[1], I was very strongly of opinion that a gift to the donor himself for his life and then over to others could not be reconciled with any recognized principle of the Mahomedan Law of Gift and must necessarily therefore, so far as the remoter donees were concerned, be bad *ab initio*. I still adhere to all that I said upon that and kindred heads in *Jainabai* v. *R. D. Sethna*[1]. I have no doubt that though I may have tripped on some minor points, that judgment is substantially right; and the more important principles which I then attempted to state are sound and were correctly stated.

Thus in the case of Nur Mahomed who follows on the life estate of Jairajbhai Peerbhoy, is the gift to him valid by Mahomedan Law. I am of course here confronted with a very great difficulty arising upon the cases of *Umes Chunder Sircar*

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

v. *Mussummat Zahoor*[1] and *Banoo Begum* v. *Mir Abed Ali*[3], where in the one case their Lordships of the Privy Council, in the other a Bench of this Court consisting of the Chief Justice and Heaton, J., held that both according to the Sunni and Shiah Schools of Law, a Mahomedan might create a succession of life estates which were said to be something like what we in England call vested remainders. I have to observe upon both those cases that what is principally in controversy here and what was principally in controversy in *Jainabai* v. *R. D. Sethna*[2], never seemed to come prominently forward either in the argument or in the decisions of the Courts and that is whether an estate of this kind can be made the subject of a gift *inter vivos*. In the Privy Council case, it was only those persons who were interested in the gifts over on failure of issue to the donee with the life estate who came before the Court and the question really seemed to be in their Lordships' opinion whether a postponed estate of that kind could be validly transferred or as I prefer to say trafficked in. I have never been able to understand how in that case it was held that the gifts over to the two sons were more than contingencies, although apparently their Lordships thought they were something less than vested remainders. For they are very careful to say that they are something like vested remainders. The facts were that these gifts over were only to take effect in the event of the lady whose life estate was interposed not having a son. Now, in the case of a child-bearing woman married, I cannot conceive of a more uncertain event than that of her having or not having a male child. And whatever nice refinement of meaning the law may place upon such a condition, I am quite certain that any person waiting upon it would have to regard it as a contingency, and a very uncertain contingency indeed. I can quite understand that if their Lordships of the Privy Council had had their minds upon that point and if it had been really a case of vested remainders, they might have come to the conclusion,

(1) (1890) L R 17 I A 201. (2) (1907) 32 Bom 172

(3) (1910) 31 Bom. 604.

1911.
CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM

though I do not think they ever did, that such a vested remainder could properly be made the object of a gift *inter vivos* But I cannot conceive how it ever could have been held, as I am sure it never has yet been held, that a gift *in futuro* contingent upon the happening of uncertain events, could be given consistently with the requirements of the Mahomedan Law of gift *inter vivos*, nor do I see how in the particular case the vested remainders could have been any more made the object of such a gift because they were called vested remainders (liable to be displaced by the happening of an uncertain event than if they had been called simply contingent interests or contingent remainders). I am not dwelling upon this for the purpose of splitting hairs but because there is very real reason in my opinion why a vested remainder in the strictest sense of the English words and a *fortiori* a contingent remainder could not possibly by any stretch of ingenuity be made the subject of a valid Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession *in præsenti* of that which may never come into possession at all. Thus though the theoretical legal meaning here given to vested remainder may seem obscure, the point is equally true whetherthe interests be of that kind or a mere contingency. For it is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee and if the donee does not take physical possession of it at the time of making the gift, then until he does, the gift is revocable. Nor was there ever such a conception in the minds of the Mahomedan lawyers who worked out their theory of the law of gift *inter vivos* as the fictitious possession of intermediaries as between the donor and the donee which would suffice for the divesting of the donor *in præsenti* and the taking of the donee *in futuro*. Nor is this difficulty in the least reduced, much less removed, by taking all trustees as donees. Trustees were in no sense known to the Mahomedan Law as donees of a thing given, so as to be able to take and hold against the donor for a third person, the real and true donee, who again does not

to ingraft the whole of our artificial system of
ments upon the Mahomedan Law has super-
opeless confusion of thought and mis-use of
believe it now to be quite impossible to avoid,
administer the Mahomedan Law on this
into conflict on the one hand with the standard
on the other with the reported cases. But
ed by insisting upon is that even a vested
is to say, an estate always ready to come into
the determination of some intermediate estate
clearly never could, according to the concep-
Mahomedan lawyers, have been given *inter*

v.
Sir
Currimbhoy
Ebrahim.

e to *Banoo Begum's case*[1], it is very easy to
misconception has arisen In the first place,
there followed the case of *Umes Chunder Sircar*
Zahoor[2], so far as to take from it the broad and
ion that the Mahomedan Sunni Law recognizes
succession of estates something like what we in
ted remainders. Then their Lordships proceeded
Shiah Law, which is much more favourable, I
Sunni Law to this proposition A number of
re translated and laid before their Lordships from
their conclusions that the lawyers of the Shiah
ry clear conception of, and had always intended
giving away of, a succession of life estates. In
their Lordships were really deciding, was, I
one of these future estates could be made the
sfer within the meaning of section 6 of the
perty Act, that is to say, whether it was some-
n a mere expectancy or *spes successonis*. But
estates of the kind might be more than a mere
, a reference to the texts upon which that deci-
and a reference to that topic of law to which they

m. 172. (2) (1890) L. R 17 I, A. 201.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

belong in the standard works will show that neither the branch of law itself nor the particular texts cited have any reference whatever to the creation of estates like vested remainders. All these texts belong to what is called in Mahomedan Law the doctrine of *hoobs* or the tying up of certain limited interests, and a very cursory examination of the whole subject will show that the law never did go any further in this direction than allowing a donor to give residence (*sukna*) or an interest for life (*umra*) or a use for a term (*rukba*) in the corpus of his property to one or more persons in succession. But the vested remainder, if there was any thing in the least like a vested remainder, was the donor's own, for it is the common feature of all these *hoobs* that the corpus on the exhaustion of the interests given must return automatically to the donor And that is the exact opposite of all the cases which I have had to consider. In that connection it is the exact opposite of the present case.

There is, I believe, no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely

It has been strenuously contended on behalf of the defendants by Mr. Tyabji that all these highly artificial notions of the English law were well known to and fully developed by the subtle intellects of the Moslem Law schools during the height of Moslem intellectual powers in the early middle ages, and he points to a rare allusion here and there to the doctrine of *Amanat* or trust But that is a misuse of the word, if it is intended to be synonymous with our extraordinarily elaborate and artificial law of trust. It is perfectly true that in simple instances, Moslem lawyers recognize a fiduciary relation, as in the case of a bailee or the father of a minor receiving property for the use of his child. Further than that I am unable to see that they ever went or intended to go, and I am still of opinion and repeat what I said in *Jainabai* v. *R. D. Sethna*(1), that I do not believe the English notion of trusts had any counterpart whatever in the brains of any Mahomedan lawyer or text book

(1) (1910) 34 Bom. 601.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

writer or that it could have been applied as it is applied, in England in making voluntary settlements to the Mahomedan law of gift *inter vivos*. For, if we take the actual cases, then we shall see that as in *Banoo Begum's* case[1], there could have been no possible delivery of seisin in favour of those who took remoter estates. And if we take the other case of *Umes Chunder Sircar* v. *Mussummat Zahoor*[2], it is equally clear that not only could there have been no possession given but that there could have been no intention of giving possession to the remainder man until the time had passed in which the tenant for life might have had a male child. And what of such vested remainders as these being capable of transfer under the Transfer of Property Act? Here, for example, to apply the rule in *Banoo Begum's case*[1] and if we suppose that they were vested remainders after the death of Nur Mahomed, for if there were vested remainders in *Umes Chander's case*[2], I really cannot see why there should not be vested remainders in this case, who would have given anything for them during Nur Mahomed's life and while he was still capable of having a son? These gifts over after the death of Nur Mahomed, notwithstanding the decisions in *Umes Chander Sircar* v. *Mussummat Zahoor*[2] and *Banoo Begum* v. *Mir Abed Ali*[1], appear to me to be too plainly contingent to admit of any dispute. But apart from their contingency and restricting myself at present to Nur Mahomed's own case, that too was a gift *in futuro*, I do not see how it could possibly be perfected by a delivery of seisin and actual possession to Nur Mahomed during the life-time of Jairajbhai who had reserved to himself actual possession and enjoyment as well as the power of revocation. It is only by introducing the machinery of our English Law of Trust that it is possible to make any approach at all to what the Mahomedan Law required as an indispensable condition precedent to a valid gift and that machinery, as I say, was totally unknown to the Mahomedan Law.

Now it is said that this gift to Nur Mahomed at any rate was not only good but irrevocable for two reasons, first that the

(1) (1907) 32 Bom. 172. (2) (1890) L. R. 17 I. A. 201.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

donor Jairajbhai received a return for the gift from the donee and this only, I think, shows how perverted the arguments, which really belong and are proper to a primitive system of law dealing with primitive facts, become when they are carried over to very complicated transactions, such as those arising upon the execution of a settlement It is undoubtedly a rule of the Mahomedan Law that where a donor makes a gift and accepts in exchange something, whether that something be independent of or part of the original gift then the rest of the gift is irrevocable. And it is seriously contended here that inasmuch as Jairajbhai reserved to himself a life interest in the settled property, that was a return which he accepted from the other donees who were only at that time donees *in futuro*. It hardly needs, I think, to go further by way of answering this argument than to take the actual cases given by the Mahomedan lawyers as illustrations of their meaning. In every one of these cases which are usually examples of simple barter between simple people, it will be seen that the return which makes the gift irrevocable is a return made by the donee implying his distinct volition in the matter In the present case the donees had no volition one way or the other They were merely passively expectant upon the death of Jairajbhai Peerbhoy. What he took for himself under his own gift he took without consulting them and it is only by a strained and utterly false analogy that it can be argued that his reservation of a life interest in the settled property was a return made to him by the postponed donees making the ultimate gift to them irrevocable.

It is also said that this gift is irrevocable because it was made to one within the prohibited degrees but that entirely depends upon whether there ever was a gift to a person within those prohibited degrees. I agree with Mr. Tyabji that the words "within the prohibited degrees of consanguinity" in this connection would certainly cover the case of a father and a son, as they have been directly held in the text books to cover the case of a mother and daughter. And if there had been an actual gift to Nur Mahomed *in præsenti*, a gift given in all respects, that is to say, accompanied by delivery of possession and acceptance of possession, then I do not doubt that that gift would

have become irrevocable, notwithstanding any revocation clause contained in the deed. But to a gift of that sort, no deed would have been necessary and no difficulty of this kind could have arisen.

My first point, therefore, is that, in my opinion, no gift *in futuro* can be made by a Mahomedan *inter vivos*. I adhere to the opinion I have always felt and expressed that to validate such a gift, there must be an actual delivery of seisin to the donee, there must be a transfer of possession and that transfer of possession must be from the donor to the donee. In the present case the only alleged transfer of possession—and I shall come to that later—was from the donor to himself and others as trustees primarily for himself and only on the happening of future events for Nur Mahomed. I will purposely refrain from saying anything about the small monthly payments reserved by the settlor for the ladies. Those do not, I think, now come into question or require any comment. But whatever may be the case as regards Nur Mahomed, all that follows in the trust-deed is made contingent upon Nur Mahomed, dying without male issue and as such it is clear beyond all doubt or question. I say that with confidence that a contingent gift cannot by any stretch of ingenuity or language be brought within the contemplation of the Mahomedan Law as a valid gift. The subject is entangled and difficult enough where we are only dealing with the gifts express to be certain but taking effect *in futuro*. Out of the fog of ideas, cases, precedents, and decisions upon that point and all connected with it, this one thing does emerge beyond all question clear and I believe a universally valid proposition of the Mahomedan Law that no gift made contingent upon the happening of uncertain future events is or ever has been held by any accredited Mahomedan lawyer to be valid. So that touching all those portions of the deed which purport to bestow contingent remainders or contingent interests perhaps I would prefer to call them, upon various persons, should Nur Mahomed die childless, I have no hesitation whatever in saying that those are not good gifts under the Mamomedan Law and no effect can be given to them.

1911.

CASSAMALLY JAIRAJBHAI v SIR CURRIMBHOY EBRAHIM.

I have explained why, I think, all the gifts in this trust settlement subsequent to the life estate of Jairajbhai are bad and why I am sure that all the gifts made contingent upon Nur Mahomed *dying without male issue are bad.*

There remain one or two further questions It has been contended that this settlement creates in law a valid *wakf* in favour of the trustees of the Mahomedan Khoja Benevolent Association Now, in the first place, I may refer to my observations in *Jainabai* v *R D Sethna*[1] upon the blending of gifts to charity with gifts to private individuals. I adhere to the opinion I expressed in that case While the Mahomedan Law insists that a gift to private person should be free of all pious and religious purposes, I do not think that this necessarily prohibits the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons If the two gifts can be completely separated, then for the purposes of that argument, I think, the answer is complete that gifts to private persons are not necessarily invalid because there is a separate gift made at the same time in *wakf.* It also appears to be the Mahomedan Law that a donor may give his property in *wakf,* that is to say, appropriate and dedicate the corpus to the service of God, while reserving for himself a life interest in the usufruct But as in the case of gifts to private individuals, I believe that I am correct in saying that the Mahomedan Law never contemplated and will not allow a merely contingent gift in *wakf.* This necessarily flows from the jural conception of a *wakf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life interest in that property does not in any way clash with that conception, for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events. There can, in such circumstances, be no appropriation synchronizing with the declaration because should the *future*

(1) (1910) 34 Bom. 604.

1911.

Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim.

events happen, it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God. In the case of this instrument, had Nur Mahomed had a son born to him, there would have been no gift over to charity. So that I have no hesitation in holding that that portion of the instrument which purports to create a *wakf* in respect of four-tenths of the settled property, is bad and void

This likewise disposes of the argument that because the deed is imprinted with the character of a *wakf*, the whole of it is irrevocable. It is certainly true that a good *wakf* cannot be revoked. It is equally true that a bad *wakf* needs no revocation.

Then there is a question whether the gift is bad for want of contemporaneous delivery of possession. On that point I am inclined to hold that it is But I do not insist strongly upon it because I am conscious that it may very well be argued on the evidence adduced by the trustees that there was a formal and paper transfer of possession from the donor to the trustees, when the donor opened an account in his books of this property as trust property. In my view, however, that would not be a sufficient compliance with the requirements of the Mahomedan Law on this subject. There was no surrender of the property in fact to anybody except the donor himself in his character as trustee for himself if indeed the evidence goes that length. And it appears to me that that falls very far short of the transfer of possession to the donee next in succession, namely, Nur Mahomed It is quite likely however that Courts, which are inclined to take a more liberal view than I am of the powers of Mahomedans to make gifts *inter vivos* in the form of a succession of estates, might hold that possession was sufficiently transferred by one of the trustees keeping in his own books an account of this property as trust property. I do not think in view of the much stronger objection I have already stated to the validity of all the contingent gifts in this deed that I need elaborate that point further.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Then it might be suggested that while this is in form a voluntary settlement or gift *inter vivos*, it is in fact and in substance a testamentary disposition of the property contained therein. That was one of the main defences in the suit of *Jainabai* v *R. D. Sethna*[1], because if the instrument in that case were held to be a will, it would of course have been revocable during the testator's life-time.

Here, it does not appear to me that the point possesses much importance but I adhere generally to everything which I said in *Jainabai's case*[1] upon it

I only wish to make one or two observations of a general character upon the very unsatisfactory position in which the influential and wealthy Khoja community stands in Bombay. On more than one occasion when a will made by a member of this community has come in question before the Courts, it has been tacitly assumed or conceded by counsel that the custom of the community over-rides the general law and permits them to dispose of the whole of their property by will. I am not, however, aware that this has ever yet been judicially decided and I very much doubt whether on a point of law so deeply rooted in the social and religious sentiments of the people as a whole the custom of a small community would be allowed to over-ride their ancient and universal law *Usus et conventio vincunt legem* is a maxim peculiarly appropriate to the constantly shifting needs and requirements of a growing commercial community, and in this country no doubt it has been extended in every direction But there are limits to its application and I am disposed to think that those limits would be passed where it is sought to be shown that the Kojas are allowed by local usage to over-ride the Mahomedan Law which prohibits any Moslem from disposing of more than one-third of his property by will. Nor I believe has it ever yet been definitely decided in the Courts whether in respect of making a will, a Khoja is governed by his own or by the Hindu Law. And it certainly does appear to me that the position of this rich and flourishing community is a peculiarly unfortunate one

(1) (1910) 34 Bom. 604.

in respect of many of the most important acts of their lives. But the only remedy for that that I can see would be by legislation. At present it is hard to say what their precise legal rights are in many highly important details relating to the disposition of their property.

It is quite true in the present case that the effect of this trust settlement would be a disposition of the whole of the settled property after the death of the settlor. During his life-time he remains in full enjoyment of it subject only to being unable to deal with the corpus. So that as in *Jainabai's case*[1], it may well be said that this is in fact and substance a testamentary disposition of the settled property. Nevertheless, it is not so in form and looking to the fact that the settlor's intention appears to have been, however, wrongly conceived and badly carried out to make gifts *inter vivos*, I do not think it necessary to go further and decide that this was a will. The point would, as far as I can see, only become practically important in connection with the alleged revocation of this deed of settlement by the unsigned will which the plaintiffs have propounded here. And whether it were a will or whether it were a settlement in the nature of a gift *inter vivos*, provided that gift were not irrevocable (and I have already given reasons for holding that it does not appear to me to be irrevocable) for any reason, the effect upon it of the alleged unsigned will would be precisely the same.

And now of this question whether or not, if the settlement be revocable, it has in fact been revoked. This point has not been very much laboured in the concluding arguments on either side, and holding the opinion that I do of the general character of the settlement itself, I should not be disposed to spend much time over it. But it is possible that a different opinion may be held upon the various points I have discussed should the case go further. And in that event the revocation or otherwise of the settlement by the intended second settlement would become vitally important to the plaintiff. So that I must consider the evidence upon this point and state what I consider to be the legal results flowing from the facts proved.

(1) (1910) 31 Bom. 601.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

In the course of the trial I suggested to the learned counsel for the plaintiff that there might be considerable difficulty in connection with the law of registration but very little argument, and none of any value, was addressed to me upon that point. The position briefly is this. The evidence shows clearly and beyond all doubt that on the birth of another son, the present plaintiff, the settlor, did wish and did intend to exercise the power of revocation reserved to himself in the concluding clause of the deed of 1886. He took advice upon the subject and finally after a great deal of discussion the draft deed was engrossed and taken to his house for signature. I do not think that any of the defendants will seriously dispute any of the facts upon which the plaintiff relies on this part of the case

Now the revocation clause in the deed of 1886 provides that the settlor may revoke, vary, etc, any of the trusts, etc., by a signed writing and further that he may declare new trusts by any such or other writing So that if his powers in this respect are limited by the terms of the revocation clause, his *intention* could only be evidenced by a writing and that writing as it would affect the immoveable property to the extent of considerably more than Rs 100 would be compulsorily registrable under the Registration Act. Not being registered the law peremptorily forbids the Court to take any notice or make any use of it as evidence of any transaction affecting such immoveable property. So that I have always felt considerable embarrassment in deciding how I ought to deal with this portion of the plaintiff's evidence and I much regret that the question was not more deeply and fully argued. The reason for that probably was that plaintiff's learned counsel put his case upon a special ground which in his opinion evidently made all reference to the Law of Registration superfluous. In the first place it was contended that the unsigned second deed or intended deed of settlement declaring new trusts was not an instrument and therefore did not fall within the terms of section 17 of the Registration Act. Next, it was contended that the Court was not asked to give effect to the writing as an instrument but merely to take

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

it as proof of the intention to execute the power and so to aid what owing to the act of God, that is the sudden and unexpected death of the settlor, proved to be defective execution.

Upon this topic the learned counsel for the plaintiff addressed the Court at very great length in opening his case marshalling a large array of English authorities in support of the proposition that the Courts of Equity in England will always aid the defective execution of a power in favour of any of the five so-called favoured classes, and the plaintiff is of course among the favoured classes Now, that proposition of law is, I take it, indisputable and not likely to be seriously challenged by any of the defendants. But what is too often lost sight of in arguing from English authorities to the conclusions which the Courts in India are asked to adopt, is that the English Courts are not hampered, as we are hampered, in some details by the provisions of our Registration Act But I have felt very grave doubt and uncertainty. I do indeed still feel much doubt and uncertainty whether I ought to look at this unsigned and unregistered writing as evidencing the way in which the settlor intended to execute his power and so as a Court of equity aid the defective execution. Both in reference to this paper and the second will I think it was contended that these not being instruments the Court might treat them as parol and so make them a ground of the exercise of its power in aid of defective execution. But so far as declaring new trusts upon the trust originally declared in the settlement of 1886 goes, this argument might be met by a reference to the revocation clause itself. For there the settlor's powers are confined to revoking by signed writing and declaring new trusts by writing of some sort, and I do not think that the Court would be justified where the settlor has chosen to impose such restrictions upon himself in enlarging them and conferring upon him a power of declaring new trusts merely by parol. So that I am always brought to this point that I have here a writing which ought to be but is not an instrument and which if it were an instrument would certainly require registration and without registration could not be treated as evidence. Then is the plaintiff in any better case because

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

the writing was not signed? To this extent I think only that it then fails to fulfil the definition of an instrument but it would only be by a process as it appears to me of rather fine and strained reasoning that the Court while admitting that it could not be used were it signed as evidence of any transaction affecting the property to hold at the same time that because it is not signed it could be used for that purpose.

Now, I must return for a moment to the facts under this head which are alleged and which are material. Those facts are, as I have said, that there were long consultations as to the form the execution of the power should take. It is clear that the settlor wished to make provision for his second son, the present plaintiff. It is natural that he should have wished to do so. The evidence is that he wished to provide for him practically upon the same terms as he had already provided for his elder son Nur Mahomed with this difference only collected from the wills that Nur Mahomed as elder brother was to have one lac more than the plaintiff. But in respect of the trust properties settled by the deed of 1886 I think I may take it as proved that Jairajbhai wished both his sons to share equally. It is also abundantly clear that he wished the two brothers to take the corpus of the property in such a way that if either of them had children, those children should come in as co-sharers with the rest. But a settlement of that kind proved to be almost beyond the ingenuity of Jairajbhai's legal advisers. Its importance is that it makes abundantly clear Jairajbhai's intention. Shortly before he died, he clearly intended to revoke every one of the contingent gifts in the settlement of 1886. Finally, it was suggested that what Jairajbhai had in mind could be best attained by giving to Nur Mahomed and Casamally the corpus of the settled property as members of a joint undivided Khoja family. I will not pause upon the legal validity of such a phrase in such a connection. I am only now concerned with its use as throwing the strongest light upon what the settlor really wished to effect. He did not wish to create a joint tenancy apparently and he could not bequeath one son's share to that son's children as yet unborn.

so that this device of counsel was considered a very happy expedient and whether it was so in fact or not it shows clearly enough that Jairajbhai did not intend the corpus of this property to go any further by way of gift than the two brothers and any children they might have. Had the case been further contested by Khanubai and Sakinabai, I gather that it would have been strenuously contended that this was merely a provisional draft and that there was nothing whatever to show that Jairajbhai really approved of it or that it expressed his true intention. And that I think would be a perfectly fair argument. I doubt very much whether merely as a matter of fact the Court would say, upon such evidence as has been laid before it, that Jairajbhai finally made up his mind to declare new trusts in the precise form as shown by the unsigned second deed of settlement. But this much the evidence does clearly prove, and I do not think that it can be disputed, that no sooner was Cassamally born to Jairajbhai than he intended to execute his power under the concluding clause of the deed of 1886 and make provision for Cassamally in the trust as well as by will. Now, it may be doubted how far English Courts of Equity would go in aiding defective execution of a power, when they felt uncertain as to the exact way in which that power was intended to be executed. It might be that in accepting the engrossed second deed of settlement as exactly and truly representing Jairajbhai's intention, the Court would go much too far. But that he had the intention of benefitting the plaintiff under the Trust Settlement, no Court could possibly doubt and if the whole of my reasoning upon the preliminary issue of limitation were wrong, here would be found, once the objection for want of registration is surmounted, a complete and final answer to the Trustee's defence on that head.

I have then to consider whether I really can look at this paper unsigned as it is, unregistered as it is, for the purpose of drawing therefrom the settlor's intention and then impressing that intention upon the conscience of the trustees so as to make that effective which was only defective because of the act of God. I believe that this again is an entirely new point

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

so far as the Courts in this country are concerned and it is a point which never could have arisen in the English Courts, so that I am entirely without authority and must decide upon what I conceive to be the true principles of law applicable. Is this paper offered as evidence of a transaction affecting the immoveable property? Strictly speaking, both Yes and No. The plaintiff says that there was no transaction affecting the property, no complete transaction, that is to say, but there was an incohate intention to which this Court operating upon the conscience of the trustees, should give effect and the defendant would say that so used, the writing, although not an instrument, is certainly being used as evidence of a transaction, that is, the final form which after the Court's order the whole matter would assume very materially affecting the immoveable property. Then in such a dilemma it appears to me that one has really to look to what is the plain justice of the case. If this paper really represents what was the intention of Jairajbhai, then but for his sudden death, he would undoubtedly have signed it and it is equally certain that it would have been registered. Is an intention of that kind to be defeated merely upon a highly technical ground such as this? I doubt it. I cannot bring myself to believe that Courts of justice are to be so tied by technicality as not to be able to do what is clearly right. All this depends upon my being satisfied that had Jairajbhai lived, he would have executed this writing and registered it in due form. But he had no time. He was taken suddenly and in circumstances the most unfortunate, for it is proved that but for a clerk's blunder, the right engrossment would have reached him while he was yet alive and in that event it would hardly be doubted. I do not myself doubt it for a moment that he would have signed and duly executed it. After that there could have been no difficulty in getting the instrument duly registered and that too I am satisfied would have been done in due course. So that I think that this is a case, if ever there was a case, in which the Courts may act upon those principles which have always guided the Courts of Equity in England and aid defective execution of a power, defective not through any fault on the part of the person intending to

execute it but by reason of the act of God. So that I should hold upon this point that the unsigned second deed ought to be effectuated by the Court to the extent of making it binding upon the consciences of the Trustees and that would put an end to all further discussion of the difficult point of limitation, and also of all those other considerations to which I have adverted as making the settlement of 1886 bad and void in itself at any rate so far as all the contingencies it contains, are concerned

I think now that I have touched upon every point which is necessary for me to consider in arriving at the conclusion upon all matters in issue between the plaintiff and those defendants who have not settled with him and the effect of what I have said is that the plaintiff is entitled to succeed in this suit as against the Trustees and all the remoter beneficiaries under the settlement of January the 7th, 1886.

By consent, costs of all parties excepting the plaintiff, and the defendants, Khanubai, Sakinabai and Sakinabai's children who are to bear their own costs should be paid half by the plaintiff and half by Khanubai and Sakinabai jointly. Costs of the Trustee-defendants to be paid as between attorney and client. Defendant No. 5 to get costs up to 4th March 1910 as between party and party and costs of one counsel for appearing on 20th of February 1911 should be paid by the plaintiff.

Attorneys for the plaintiff :—Messrs *Payne & Co.*

Attorneys for the defendants :—Messrs. *Thakurdas & Co.*; *Surajmal B. Mehta*; *Matubhai, Jamietram & Madan*, *Edgelow, Gulabchand, Wadia & Co.*; *Kanga & Sayani*, *Jamsetji, Rustomji & Devidas*

B. N. L.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. September 18.

SHEVDAS DAULATRAM MARWADI, ORIGINAL PLAINTIFF, *v.* NARAYEN VALAD ASAJI, ORIGINAL DEFENDANT.*

Limitation Act (IX of 1908), section 31 (1)—Period of two years for filing suits—Period not "prescribed"—Last day Sunday—Suit filed on Monday next—Limitation

A question having arisen as to whether a suit for which provision is made under section 31 (1) of the Limitation Act (IX of 1908), if instituted on a Monday, one day after the period of two years from the date of the passing of the Act has expired, can be taken to have been instituted within the period of two years,

Held that the suit could not be taken to have been instituted within the period of two years and that two years specified in section 31 of the Limitation Act (IX of 1908) was not the period of limitation 'prescribed.'

REFERENCE made by S. P. Badami, Second Class Subordinate Judge of Shevgaum in the Ahmednagar District, under Order XLVI, Rule 1, of the Civil Procedure Code (Act V of 1908).

The plaintiff sued under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to recover Rs. 198 by sale of the mortgaged property. The mortgage bond was dated the 11th June 1892 and the money sued for became due on the 11th March 1893. Under Article 132 of the Limitation Act (IX of 1908) the period of limitation of twelve years for filing the suit expired on the 11th March 1905, but as section 31 of the Act, which came into force on the 7th August 1908, made a special provision for such suits enacting that such suits may be filed within two years from the date of the passing of the Act, and as the said period of two years expired on Sunday, the 7th August 1910, the plaintiff filed the suit on the next day, that is, on Monday the 8th August 1910. The suit being thus filed one day after the period of two years given by section 31, and a question having arisen as to whether the suit was in time, the Subordinate Judge referred the following question for an authoritative decision under Order XLVI, Rule 1, of the Civil Procedure Code (Act V of 1908):—

"Whether a suit for which provision is made *under section* 31 of the present *Limitation Act, if instituted* on the 8th

* Civil Reference No. 4 of 1911.

August 1910 (the 7th August being Sunday), can be taken to have been instituted within a period of two years from the date of the passing of the Act?"

The opinion of the Subordinate Judge was in the affirmative.

The suit being governed by the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the decree of the Subordinate Judge was not appealable under section 10 of the Act. In the body of the reference the Subordinate Judge noticed Civil Reference No. 9 of 1910 in which it was decided that the two years' period allowed by section 31 of the Limitation Act could not be taken as the period prescribed, sections 9 and 10 of the General Clauses Act (X of 1897), sections 4 and 12 of the Limitation Act (IX of 1908), *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy*[1], *Peary Mohun Aich* v. *Anunda Charan Biswas*[2], *Aravamudu Ayyangar* v *Samiyappa Nadan*[3], *Sambasiva Chari* v. *Ramasami Reddi*[4].

K. H. Kelkar (amicus curiæ) for the reference.

P. D. Bhide (amicus curiæ) against the reference

SCOTT, C. J.:—We have already held in *Dayaram* v. *Laxman*[5] that the two years' time specified in section 31 of the Limitation Act of 1908 is not the period of limitation 'prescribed'. We are now asked whether a suit for which provision is made in section 31 (1), if instituted on a Monday, one day after the period of two years from the date of the passing of the Act has expired, can be taken to have been instituted within the period of two years.

The learned Subordinate Judge, who made the reference, thinks the suit must be taken to be within time, relying upon *Sambasiva Chari* v. *Ramasami Reddi*[4] and *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy*[6]. In the last mentioned case it was held that where thirty days were allowed for making a deposit in Court under section 174 of the Bengal Tenancy Act 1885, the deposit might be made within thirty-one days if the

(1) (1890) 18 Cal. 231.
(2) (1891) 18 Cal. 631.
(3) (1897) 21 Mad. 885.
(4) (1898) 22 Mad. 179.
(5) (1911) 13 Bom. L. R. 234.
(6) (1890) 18 Cal. 231.

1911.

SHEVDAS DAULATRAM v. NARAYEN.

thirtieth day fell on a Sunday. The learned Judges deduced from the cases of *Mayer* v. *Harding*[1], and *Waterton* v. *Baker*[2], the broad principle that although the parties themselves cannot extend the time for doing an act in Court, yet, if the delay is caused not by any act of their own but by some act of the Court itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. We are unable to find any such general principle laid down in those cases. In *Mayer* v *Harding*[1] the appellant having applied to the Justices to state a case under 20 & 21 Vict. C. 43, (which provides that the party shall within three days after receiving such case transmit the same to the proper Court) received the case from the Justices on Good Friday and transmitted it to the proper Court on the following Wednesday, and it was held that as the offices of the Court were closed from Good Friday till Wednesday, the appellant had sufficiently complied with the requirements of the section. Mellor J. in delivering the judgment of the Court said,

"*Where a statute requires a thing to be done within three days, or six months, or within any particular period, the time may no doubt be circumscribed by the fact of its being impossible to comply with the statute on the last day of the period so fixed.* But this is not the present case. Here it was impossible for the appellant to lodge his case within three days after he received it. As regards the conduct of the parties themselves, it is a condition precedent But this term is sometimes used rather loosely. I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the Court being closed, and there being no one to receive the case."

The opening passage in Mellor J.'s judgment refers to the well-established rule of construction in England that Sunday is not a *dies non* in computing time in accordance with an Act of Parliament. In *Ex parte Simpkin*[3] it was said : " where an Act of Parliament gives a given number of days for doing a particular act, and says nothing about Sunday, the days mentioned are to be taken as consecutive days including Sunday." The same rule was applied in *Rowberry* v. *Morgan*[4] and *Peacock*

(1) (1867) L. R. 2 Q. B. 410.
(2) (1868) L. R. 3 Q. B. 173.
(3) (1859) 29 L. J. M. C. 23 at p. 25.
(4) (1854) 23 L. J. Ex. 191.

1911.

SHEVDAS DAULATRAM v. NARAYEN.

v. *The Queen*[1] and *Wynne* v. *Ronaldson*[2]: in this last mentioned case Crompton J. followed *Peacock* v. *The Queen*[1] saying, "we have always held that where Sunday is the last day, Monday is too late for renewing a writ." The case of *Waterton* v. *Baker*[3], cited in *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy*[4], was one in which the neglect of the appellant's adversary created an impossibility against which the appellant was relieved.

None of the other cases in *Hossein Ally* v. *Donzelle*[5] or *Peary Mohun Aich* v. *Anunda Charan Biswas*[6] were cases of delay caused merely by the last day of a period falling on a Sunday.

We think that as the Special Statutory provisions, section 10 of the General Clauses Act and section 4 of the Limitation Act, do not apply to the case, we must decline to sanction the non-observance of the provisions of section 31 (1) on the ground that the last day of the two years' period fell on a Sunday. It is not a case of hardship. It was a simple matter of calculation to realise that the suit in order to get the advantage of the saving provisions in section 31 must at latest be instituted on the Saturday preceding the last Sunday For these reasons we answer the question in the negative.

Order accordingly.

G. B. R.

(1) (1858) 27 L. J. C. P. 224.
(2) (1865) 12 L. T. N. S. 711.
(3) (1868) L. R. 3 Q. B. 173.
(4) (1890) 18 Cal. 231.
(5) (1880) 5 Cal. 906.
(6) (1891) 18 Cal. 631.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

1911. October 5.

BAI NANDKORE (ORIGINAL APPLICANT), APPLICANT, *v.* SHA MAGANLAL VARAJBHUKHANDAS AND ANOTHER (ORIGINAL OPPONENTS), OPPONENTS.*

Succession Certificate Act (VII of 1889), sections 9, 25, 26—Civil Procedure Code (Act V of 1908), section 96—Succession Certificate—Condition of Security—Appeal.

An order granting a succession certificate accompanied by a condition that security should be given is appealable.

An order directing that a certificate should not be granted unless security is furnished is not appealable.

Bai Devkore v. Lalchand Jivandas(1) explained.

APPLICATION under the extraordinary jurisdiction, section 115 of the Civil Procedure Code (Act V of 1908), against an order passed by Rattanji Mancherji, Judge of the Court of Small Causes at Ahmedabad with appellate powers, setting aside an order passed by M. J. Yajnik, Joint Subordinate Judge, in the matter of an application for succession certificate under Act VII of 1889.

One Harivallabh Mulchand died in or about the year 1906 after making a will by which he bequeathed, among other things, a share of the Ahmedabad Manufacturing and Calico Company to his sister Bai Ganga. Bai Ganga died intestate on the 7th January 1910 and after her death Bai Nandkore, a daughter of Harivallabh's sister, applied, as the heir of the testator's sister, for a succession certificate with respect to the said share under the Succession Certificate Act (VII of 1889). The application was opposed by Bai Dhankore, a daughter of the sister of Bai Ganga's mother, and by Shah Maganlal Varajbhukhandas who was the son of a daughter of the maternal uncle of Bai Ganga.

The Subordinate Judge found that under the will of Harivallabh, Bai Ganga was the absolute owner of the property she got from her brother including the property for which the certificate was sought and he passed the following order :—

* Application No. 151 of 1911 under extraordinary jurisdiction.

(1) (1891) 19 Bom. 790.

I will however order that the said certificate shall issue as applied for on the applicant furnishing security to the extent of the value of the property for which a certificate has been applied for.

The opponent, Shah Maganlal Varajbhukhandas, appealed and the Appellate Court found that the will of Harivallabh gave to Bai Ganga only a limited interest and that under the terms of the will the opponent was entitled to the share. The appeal was, therefore, allowed and the order of the first Court was set aside.

Bai Nandkore preferred an application under the extraordinary jurisdiction, section 115 of the Civil Procedure Code (Act V of 1908), urging *inter alia* that the Appellate Court erred in exercising a jurisdiction not vested in it, as no appeal lay against the order passed by the Court of first instance under Act VII of 1889. A *rule nisi* was issued requiring the opponents to show cause why the order of the Appellate Court should not be set aside.

G. N. Thakore for the applicant in support of the *rule nisi*.

L. A. Shah for opponent Shah Maganlal, to show cause.

SCOTT, C. J.:—In this case there was a contest between the claimants as to the right to a succession certificate in relation to a share belonging to a deceased testator. One of the claimants claimed as the heir of the testator's sister who, the other claimant said, had only a life-interest, and the other claimant claimed as remainder-man under the will upon the termination of the life-interest of that sister.

The Subordinate Judge decided in favour of the heir of the sister whereas the Judge with Appellate Powers, on appeal, decided in favour of the remainder-man.

The order granting the certificate was accompanied by a condition that security should be given, and upon the strength of the existence of that condition, it is contended before us that no appeal lay from the order of the original Court. In support of this contention the decision of this Court in *Bai Devkore* v. *Lalchand Jivandas*[1] has been relied on.

(1) (1894) 19 Bom. 790.

1911.

BAI NANDKORE v. SHA MAGANLAL.

Now that decision was given in a case where there was no contest apparently between two different persons claiming a succession certificate, but the brother-in-law of the woman who claimed the succession certificate contended that the grant should not be made to her unless she was ordered also to furnish security, and the Judge ordered that she should furnish security upon taking the grant It was against the order that she should furnish security that she appealed. It was held that no appeal lay The Acting Chief Justice states the grounds of the appeal to the District Court of Broach: (1) that the order requiring security was erroneous, as she was the absolute owner of the moveables of her husband; (2) that the legislature did not intend that security should be required from absolute owners by right of heirship The question, then, before the High Court was whether the discretion of the original Court in deciding that security should be taken from the widow, ought to be interfered with in an application under section 622 (Civil Procedure Code, 1882) It is true that there is a paragraph in the judgment of the Acting Chief Justice at page 793 which indicates that in his opinion, as in the opinion of the Allahabad High Court, a conditional order for the grant of the certificate would not be an order for the grant of the certificate. That expression of opinion was not necessary for the decision of the case. Mr Justice Fulton, the other Judge, in delivering judgment said that he felt satisfied that the Assistant Judge was right in following *Bhagwani* v. *Manni Lal*[(1)] and holding that no appeal lay against the order of the Subordinate Judge requiring the petitioner to furnish security under section 9 of Act VII of 1889 as a condition precedent to granting her a certificate. Then he goes on to say: "It may be that when the Subordinate Judge makes a final order granting or refusing the certificate, such order, if unfavourable to the applicant, and the grounds on which it is based, will be appealable under section 26"; so he treats the question before the Court as a question whether the order requiring security is appealable or not and holds that no appeal lies. This is the view which has

(1) (1891) 13 All. 214.

1911

BAI NANDKORE v. SHA MAGANLAL.

been taken in the Madras High Court in several reported cases and also by the Calcutta High Court.

In the present case, however, as we have stated, the real question is which person was entitled to a grant of the certificate.

The question has been argued as to the rights of the respective parties to the grant of a certificate, and the certificate has been granted after a consideration of those rights That order granting the certificate was, in our opinion, appealable under section 26. The grant of the certificate does not under the Act finally determine the rights of the parties. Section 25 of the Succession Certificate Act (VII of 1889) provides · "No decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties." We, therefore, do not think it necessary or desirable to express the opinion that we have formed as to the rights of the respective parties under the will of the testator.

We discharge the rule with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GOVIND ANNAJI BODHANI (ORIGINAL PLAINTIFF), APPELLANT, v. TRIMBAK GOVIND DHANESHWAR (ORIGINAL DEFENDANT), RESPONDENT.*

1910. *February 14.*

Hindu Law—Rights to well and water—Indivisible rights—Presumption—Partition of property which is joint.

Under Hindu Law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal, and, after partition these must be enjoyed by the separated co-parceners by turns.

SECOND appeal from the decision of C Fawcett, District Judge of Ahmednagar, reversing the decree passed by H. A. Mohile, Subordinate Judge of Ahmednagar.

* Second Appeal No. 332 of 1909.

1910.

GOVIND ANNAJI v. TRIMBAK GOVIND.

Suit for a declaration that a certain well was the joint property of the plaintiff and the defendant The well in question was situated between the properties belonging to the plaintiff and the defendant, which properties were contiguous to each other, and which originally formed one *wada* and belonged to a single owner. The defendant contended *inter alia* that the well was not the joint property and that he alone was entitled to use it.

The Subordinate Judge held that the well in question was the joint property of the plaintiff and the defendant and granted the declaration sought This decree was, on appeal, reversed by the District Judge who held that the plaintiff had not established his right to the joint ownership of the well. In dealing with this question he remarked as follows :—" The Subordinate Judge says . it is extremely likely that the well was *kept joint at the time of the partition. This is no* doubt a consideration which is to be taken into account, but it is at best a surmise which is unsupported by any reliable evidence "

The plaintiff appealed to the High Court.

M R. Bodas for the appellant

K. H. Kelkar for the respondent

CHANDAVARKAR, J —This was a suit brought by the appellant for a declaration of his right to use the water of a well jointly with the respondent and for an injunction to restrain the latter from obstructing the appellant in the exercise of his right. The respondent in his written statement denied the appellant's claim and asserted his exclusive right to the well. The Subordinate Judge, who tried the cause, found upon the evidence that the well had at one time been attached to two houses owned by two brothers constituting a joint Hindu family and that they effected a partition of the houses: that, some time after that, one brother sold the house allotted to him at the partition to the appellant and the other sold his to the respondent. These facts are admitted by both parties before us and have also been found by the District Judge, from whose decree this second appeal is preferred. As the two brothers had only one well, that is the one now in dispute, which they jointly used as owners

before the partition, the Subordinate Judge thought that it was "likely" that at the partition they had reserved it as joint. Accordingly he awarded the appellant's claim. On appeal by the respondent, the District Judge held that what the Subordinate Judge had treated as a matter of likelihood was "a mere surmise" not supported by any evidence in the case. He, therefore, reversed the Subordinate Judge's decree and disallowed the appellant's claim.

Both the Courts below have not borne in mind the rule of Hindu Law applicable to the present case. What the Subordinate Judge treated as a matter of probability and the District Judge as a mere surmise is dealt with by that law as a matter of legal presumption. The rule is that rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal, and that after a partition these must be enjoyed by the separated co-parceners by turns "Water, or a reservoir of it, as a well or the like, being unequal (to the allotment of shares) must not be distributed by means of the value, but is to be used (by the co-heirs) by turns" (The Mitakshara, Ch I, sec. IV., plac. 21, Stokes' Hindu Law Books) The Vyavahara-Mayukha is also to the same effect "Water from wells which have flights of steps, and wells from which it is drawn by buckets &c. is (to be) enjoyed according to need." (Mandlik's Hindu Law, page 71, lines 34 to 36) The Viramitrodaya says that "water, that is, a reservoir of water, such as a well, shall be used by all accordingly as they" (*i e*) (the co-parceners after partition) "require" (Golapchandra Sarkar's Edition, page 249.) When it is laid down that a well is "indivisible" (*avibhajyam*) what is meant is that "it cannot be distributed like land or money But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns" (West and Buhler, 3rd Edition, pages 831 and 832)

The appellant in the present case starts with this rule of Hindu Law in his favour on the facts which are common ground; and his claim must be awarded unless the respondent is able to prove by affirmative evidence that the right to own

1910.

GOVIND ANNAJI v. TRIMBAK GOVIND.

and use the well jointly has been lost by the appellant, either because of an express agreement at the partition whereby his predecessor-in-title relinquished that right in favour of his brother, or because of his or the appellant's exclusion to his knowledge by the latter or the respondent for such a period as in law is necessary to give the latter a right to the well by adverse possession No plea based on adverse possession was set up by the respondent in the Court of first instance. Therefore the only question is whether the respondent's predecessor-in-title acquired by express agreement an exclusive right to the well at the partition We must ask the lower appellate Court to find on the following issue —

Whether the well in dispute was allotted at the partition to the person from whom the defendant derived his title.

The *onus* of this issue will lie in the first instance on the defendant The lower appellate Court should record its finding on the evidence on the record and parties are not to be allowed to adduce fresh evidence Finding to be remitted within two months.

[On the 27th June 1910 the lower Court certified its finding on the above issue in the negative.

The High Court (Chandavarkar and Heaton, JJ.) accepted, on the 22nd August 1910, the finding of the lower Court on the issue sent and reversed the decree passed by the lower appellate Court and restored that of the Subordinate Judge.]

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

RAO SAHEB MANAJI RAJUJI KALEWAR, PLAINTIFF, v. KHANDOO BALOO, DEFENDANT.*

1911.
June 16.

Civil Procedure Code (Act V of 1908), Order XXXIII—Suit by widow in formâ pauperis—Death of plaintiff—Right of executor who is not a pauper to continue the suit in formâ pauperis.

The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix in *formâ pauperis*, even though admittedly he is not a pauper, simply because his testator or testatrix was a pauper.

ONE Maloobai, a widow, filed this suit in *formâ pauperis* against the defendant on the 12th August 1909 praying *inter alia* that the defendant might be ordered to deliver up a certain deed of gift to be cancelled and to hand over any title-deeds relating to certain properties. Pending the hearing of the suit, *viz.*, on the 25th December 1909, Maloobai died leaving a will, dated 15th June 1908, whereby she appointed the present plaintiff Rao Saheb Manaji Rajuji and one Madhavrao Mahadeo her executors. Rao Saheb Manaji applied for and obtained probate on the 15th June 1910 and by a Chamber order, dated 18th June 1910, his name was brought on the record as plaintiff in the place of the deceased Maloobai. On the 17th June 1910 an order was made by the Prothonotary which directed amongst other things that the said Rao Saheb be at liberty to continue the suit in *formâ pauperis*. On the suit being called on for hearing on the 1st of April 1911, Davar J., on the application of counsel for the defendant, ordered that the first issue, *viz.*, whether the plaintiff can maintain or continue this suit in *formâ pauperis*, be tried as a preliminary issue. The Court further ordered the Prothonotary to give notice to the Government solicitor to appear by counsel on the argument if he thought fit.

* Original Suit No. 893 of 1909.

1911.

Manaji Rajuji (Rao Saheb) v. Khandoo Baloo.

Vakil and *B. J. Wadia*, for the plaintiff.

Talyarkhan and *Kanga*, for the defendant.

Strangman, Advocate-General, for Government.

Davar, J. :—Maloobai, widow of Rajanna Mahadavji, originally petitioned to this Court to be allowed to institute this suit in *formâ pauperis* against Khandoo Baloo, the present defendant, praying for certain reliefs in connection with a document which she alleged the defendant had fraudulently got her to execute. She was granted leave to sue in *formâ pauperis* and her petition became a suit. In that suit she claimed that the defendant may be ordered to deliver up to be cancelled a certain deed of gift which she alleged he had obtained fraudulently from her and she prayed that the title-deeds of her property may be ordered to be returned to her

Pending the hearing of the suit she died, but she was a woman who was either herself very astute or was in very astute hands, and before her death she made a will whereby she appointed Rao Saheb Manaji Rajuji Kalewar, the executor thereof, and she disposed of the property which she was claiming in the suit in certain ways in that will The defendant was one of her nephews. She had three other nephews, and I am told that the will is in favour of the other three nephews. Rao Saheb Manaji Rajuji, on the 16th of June 1910, made an affidavit setting out the circumstances under which he became executor of Maloobai's will and he prayed that this Honourable Court may be pleased to allow his name to be brought on the record as plaintiff in place of the deceased Maloobai and that he may also be allowed to continue the suit in *formâ pauperis*. On the 17th of June 1910, an order was made by the Prothonotary, which, amongst other things, directed that the said Rao Saheb Manaji Rajuji Kalewar be at liberty to continue this suit in *formâ pauperis*.

The suit came on for hearing before me on the 1st of April 1911. Mr. Talyarkhan, for the defendant, asked me to try as a preliminary issue the following question, namely, whether the plaintiff can maintain or continue this suit in *formâ pauperis*

The order of the Prothonotary of the 17th of June 1910 seems to me to be very unusual. At all events that is the first time I came across an instance where a well-to-do and a titled citizen of Bombay was allowed to continue a suit as a pauper and I allowed the arguments on that issue to stand adjourned and directed the Prothonotary to give notice to the Government solicitor and inform him that the Court would hear counsel on behalf of Government, if they wished to be heard. I have no doubt the Prothonotary in making the order was influenced by arguments, such as Mr. Vakil has addressed to the Court on the argument of this question before me. But it seems to me a most anomalous thing to permit the present plaintiff to continue the suit against the defendant as a pauper. All the provisions of Order XXXIII of the Civil Procedure Code seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means, being permitted to maintain or defend a suit in *formâ pauperis*. Mr. Vakil admits that if his client had come before the Court and asked to institute this suit in *formâ pauperis*, the application would necessarily have to be refused But he contends that permission once being given to Maloobai, her representative, as a matter of right, is entitled to come in and continue the suit with the same privilege that was accorded to his testatrix. This is an argument which I am not prepared to accept. The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix in *formâ pauperis*, even though admittedly he is not a pauper, simply because his testator or testatrix was a pauper

In this case there is no question that the plaintiff is in well-to-do circumstances He is not beneficially interested in the estate of Maloobai and he is carrying on this suit in the interest of the three nephews of Maloobai I do not know whether the three nephews are paupers or not. They may be in well-to-do circumstances. They may have their rights; they will be able to establish those rights by taking such steps

1911.

MANAJI RAJUJI (RAO SAHEB) v. KHANDOO BALOO

as may be necessary to carry on the fight which Maloobai had begun. Here we have an executor without any personal interest in the estate of Maloobai fighting other people's battle and insisting on continuing the suit with the privilege to which Maloobai was entitled but to which he is clearly not entitled

Reliance is placed upon a very ancient case—*Bhagbut Doss* v. *Bulоram Doss*[1] Since yesterday evening when the argument stood over, I have gone through all the cases that were cited before me and this is a case which I have tried to understand the reasoning of and I regret to say I have failed The learned Judges begin there by saying that there was no provision to be found in Chapter V, Civil Procedure Code, for an enquiry that the applicant who claimed to be the representative of an admitted pauper was a pauper or not and because there is no provision for an enquiry, their Lordships held that the man ought to be allowed to continue the suit in *formâ pauperis.* I confess I absolutely fail to grasp reasoning of the decision. I should have thought that the absence of such provision in the Code was very strong argument for holding the other way Whatever may be the meaning of that judgment, I am not prepared to follow it.

Then the case of *Arunachala* v. *Ayyavu*[2] was cited. Looking through the case I find that that was a case in which the administratrix who sought to institute the proceedings as the administratrix of her husband in *formâ pauperis* was admittedly herself a pauper. In this case the plaintiff is admittedly a man of means.

I find that in a case decided by Mr. Justice Starling, *viz., In the matter of the will of Dawubai*[3], there are very clear indications that an executor or an administrator would not be allowed either to institute or maintain or continue legal proceedings, unless and until it was shown that he himself was a pauper.

(1) (1865) 3 W. R. (Mis.) 20. (2) (1884) 7 Mad. 318 at p. 320.
(3) (1893) 18 Bom. 237.

Under these circumstances I am clearly of opinion that Rao Saheb Manaji Rajuji is not entitled to maintain this suit in *formâ pauperis.*

I find on the issue that the present plaintiff is not entitled to maintain or to continue the suit in *formâ pauperis.* Plaintiff must pay defendant's costs incurred by him from the 17th of June 1910 up to date.

Attorneys for the plaintiff: *Messrs. Dadachanji & Pocha.*

Attorneys for the defendant: *Messrs. Mulla & Mulla.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

BHAISHANKER NANABHAI AND OTHERS, PLAINTIFFS, v. MORARJI KESHAVJI & Co., DEFENDANTS.*

1911. *July 24.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Consent decree amounts to* res judicata—*Consent decree between predecessors-in-title of parties in suit—Injunction granted in former suit*—Res judicata *and estoppel distinguished.*

A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in section 11 of the Civil Procedure Code "has been heard and finally decided."

In re South American and Mexican Company[1], followed.

A consent decree come to between the predecessors-in-interest of the present parties touching matters now substantially and directly in issue between them is *res judicata.*

Res judicata ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over.

THE plaintiffs in this suit were the officiating Trustees of the Goculdas Tejpal Charities and as such were entitled to a certain immoveable property situated at Dady Sett Agiary

* Suit No. 46 of 1911.

(1) [1895] 1 Ch. 37.

1911.

BHAISHANKER NANABHAI v. MORARJI KESHAVJI & Co.

Lane known as the Goculdas Tejpal High School Building which building was being used for the purposes of a school and consisted of a ground floor and an upper floor.

The plaintiffs had purchased this property on the 17th September 1892 from the General Assembly of the Church of Scotland for the promulgation of the Gospel in foreign ports.

The property to the north of the school buildings consisting of land and a house therein formerly belonged to one Ramji Bhagwan, the predecessor-in-title of the defendant, and in 1890 consisted of a ground floor and one upper storey.

In the year 1890 Ramji Bhagwan made preparations to make alterations in his house and for erecting an additional storey to his premises A suit thereupon was filed in the High Court of Bombay being Suit No 102 of 1890 by the then owners of the school buildings against Ramji Bhagwan to restrain him from carrying out the intended alterations and additions and for a declaration as to their rights to light and air received through the doors and windows in the north wall of the school building An interim injunction was granted against the defendants in that suit on the 18th July 1890 and the suit was decided by a consent decree passed on the 2nd December 1890. By that consent decree the then plaintiffs were declared entitled to free and uninterrupted access of light and air to and through the windows in the upper floor on the north side of their premises and to access of light and air through the ground floor windows on the north side obstructed and hindered only so far as had hitherto before been the case by the house which then stood on the premises belonging to the defendant and as defined in the Engineer's report, and the Court further ordered with the like consent that the defendant be perpetually restrained from building or maintaining erected any building so far as to interfere with the free access of light and air to and through the plaintiff's said windows on the upper floor or with the access of light and air hitherto enjoyed to and through the plaintiff's ground floor windows as defined in the Engineer's report.

The property of Ramji Bhagwan on the north of the school premises was subsequently acquired by the present defendants who in October 1910 commenced building operations a plan of which indicated that the defendant intended to erect, in place of the building which originally consisted of a ground floor and one upper storey, a building consisting of a ground floor and two upper stories which the plaintiffs alleged would have the effect of materially affecting and diminishing the quantity of light and air enjoyed by the windows in the north wall of the school building.

The plaintiffs therefore filed this suit for a declaration that the defendant was not entitled to erect or maintain erected any building on his premises save and except of the kind and on the terms mentioned in the consent decree in Suit No. 102 of 1890 and that he might be restrained by a perpetual injunction from erecting or maintaining erected any building except on the terms of the said decree, and in the alternative that the defendant might be restrained by a perpetual injunction from erecting or maintaining erected any building on his premises in accordance with the plan of which he had given inspection to the plaintiffs so erecting or maintaining erected any other building so as to materially affect and interfere with the light and air as enjoyed by the school buildings through the ancient windows on the ground and the first floor or so as to make any portion of the said school buildings unfit for being used for the purposes of a school.

At the trial of the suit the following issue was raised and tried as a preliminary issue:—

Whether the defendant is bound by the consent decree of 2nd December 1890 or the injunction therein contained.

Desai, with *Jayaker* and *Setalvad*, for the plaintiffs

A consent decree can operate as a *res judicata*: *Minalal Shadiram* v. *Kharsetji Jivaji*[1], *Aubhoycssury Dabee* v. *Gouri Sunkur Panday*[2], *Nicholas* v. *Asphar*[3]; *In re South American*

(1) (1906) 30 Bom. 395. (2) (1895) 22 Cal. 859.
(3) (1896) 24 Cal. 216.

1911.

BHAISHANKER NANABHAI v. MORARJI KESHAVJI & Co.

and Mexican Company[1]. If it is not *res judicata* the consent decree operates as a covenant: Transfer of Property Act, section 40. The fact that the defendant took possession before he had notice of the decree is immaterial: Transfer of Property Act, section 54. If section 40 does not apply the decree amounts to a grant of an easement

Strangman, Advocate-General (with him *Bahadurji*), for the defendant.

An injunction does not run with the land:—*Attorney-General* v. *Birmingham, Tame, and Rea Drainage Board*[2]; *Dahyabhai* v. *Bapalal*[3] The decree is an injunction and therefore cannot run with the land. If it is a covenant it relates to an easement and therefore section 40 of the Transfer of Property Act does not apply See section 11 of the Civil Procedure Code. In the former case there was no hearing and final disposal. *In re South American and Mexican Company*[1] relates to estoppel. In India estoppel is confined to the Evidence Act and the Civil Procedure Code. Under the Civil Procedure Code there is no estoppel by judgment unless the case is heard and decided It is not contended that the decree acts as an estoppel under the Evidence Act.

Desai in reply.

The Bombay case relates to the execution of the decree We do not seek execution. The Chancery case was to enforce a judgment against successors.

BEAMAN, J.:—Upon this preliminary issue two distinct points arise. First, whether a decree passed by consent be *res judicata* under section 11 of the Civil Procedure Code. As to that there used to be a considerable conflict of opinion but I think I may now take it as settled by the decision in *In re South American and Mexican Company*[1], that a consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum*; and this notwithstand-

(1) [1895] 1 Ch. 37. (2) (1891) 17 Ch. D. 685.
(3) (1901) 26 Bom. 140.

1911.

BHAISHANKER NANABHAI v. MORARJI KESHAVJI & Co.

ing the words in section 11 "has been heard and finally decided." These words give ground for argument upon one point only, I think, that is, whether the matter in issue has literally been heard by the Court. It has been finally decided, indeed much more finally decided by a consent decree than by a decree *per invitum*, for against the consent decree there is no appeal; and although it has often been said that a consent decree represents no more than an agreement of parties, I have always felt much doubt whether that correctly expresses, for the purposes of *res judicata*, the consequences of decrees by consent. For, when a party has raised his defences and has then consented to judgment, it is the same thing as though he had abandoned his defences and admitted them to be untenable. Carrying that one step further, it is the same thing as saying that his case has been heard, for, if a party chooses to admit that he is not in a position to sustain his defences so far as the Court is concerned that is practically the same thing as though he had adduced no evidence and decision had been given against him on all those issues I have always been of opinion that decrees by consent had the same effect for the purposes of *res judicata* as decrees given in contested suits. That was my view before 1895 when some of the English Courts at any rate seemed to incline the other way Since the decision of the case I have cited, I apprehend that no further doubt will be thrown upon the correctness of this proposition.

The second question is whether the decree by consent between the predecessors-in-interest of the present parties is really *res judicata* of the questions at issue in this suit Here the defendant relies upon the case of the *Attorney-General* v *Birmingham, Tame, and Rea Drainage Board*[1], and the two cases decided by Benches of this Court one in *Vithal* v *Sakharam*[2], and the other in *Dahyabhai* v *Bapalal*[3] The two latter cases really present no difficulty, for they go no further than affirming, what has never been seriously disputed,

(1) (1881) 17 Ch. D. 685. (2) (1899) 1 Bom. L. R. 854.
(3) (1901) 26 Bom. 140.

1911.

BHAISHANKER NANABHAI v. MORARJI KESHAVJI & Co.

that injunctions do not run with the land. In both these cases the point arose in execution proceedings and as the only relief sought to be obtained was by enforcing the injunction upon a person who was not a party to the suit in which it was made, that question could never be answered but in one way. Here it is contended for the defendant that inasmuch as when the predecessors-in-interest of the present parties litigated before, the result of the consent decree was an injunction restraining the defendants then from raising their building so as to diminish or obstruct plaintiffs' ancient lights, this case is exactly on all fours with *Attorney-General* v. *Birmingham, Tame, and Rea Drainage Board*[1], and I must admit that the cases are very like. In that case it appears as though there were subsequent proceedings and an action to enforce the judgment given against the Birmingham Municipality upon the Birmingham Drainage Board, a body which had subsequently come into existence and taken over the functions of the Municipality touching the matter in suit. It appears, however, the prayer of the action contemplated transferring the whole decree, injunction and all, passed against the Municipality to the Drainage Board and this the Court refused to allow upon the ground principally that the injunction did not run with the land. But it does not appear, as clearly as I could wish, from that case, whether the substantial matter in issue between the parties, irrespective of the relief to be given consequent upon its decision, would have been held, if separated from the prayer to transfer the injunction, *res judicata*. I must admit that on the facts stated in the reports and having regard to the judgment of the Court, it is very doubtful whether this would not have been so. I, however, have to decide the question before me with reference to the language of our own statute, which the defendant thinks strengthens his case rather than weakens it. It is a part of his contention that the matter in issue between the parties now is not the matter which was in issue between their predecessors-in-interest when the consent decree

(1) (1881) 17 Ch. D. 685.

Bhusi Nan Mo Kis &

was passed; and this argument may seem to be fortified by what is undoubtedly the law that the relief given consequent upon the determination of the matter in issue in the former suit cannot be carried over as though it too were *res judicata* and made a part of the decree in this suit.

So far as the injunction is concerned, I am quite clear that the plaintiffs cannot have the benefit of that in this suit merely because it was granted in the former, but it is easy to see that a distinction can be drawn between the matters substantially in issue and the particular form of relief granted. What then was the matter substantially in issue between the predecessors-in-title of these parties? Clearly I think, whether the defendants were entitled to raise their building beyond its then height, ground floor and one storey, and that is precisely the matter in issue in the present suit. I cannot myself see any difference between the ground of action in this suit and the defence raised, and the ground of action and defence raised in the former suit.

I should like to observe upon the cases which have been cited on both heads of this preliminary point that great confusion is introduced by treating *res judicata* and estoppel as identical terms. It is only necessary to point out in the first place that a true *res judicata* ousts the jurisdiction of the Court; while estoppel does no more than shut the mouth of a party. In the next place, to put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. It is particularly with reference to the first part of my decision on this point and to the English cases which have been cited, that I make these remarks. The question I am now considering has, of course, nothing whatever to do with estoppel at all.

For these reasons and influenced chiefly by these considerations, it appears to me clear that the consent decree come to between the predecessors in interest of the present parties

1911.

BHAISHANKER NANABHAI v. MORARJI KESHAVJI & Co.

touching matters now substantially and directly in issue between them, *viz* —whether the defendant is entitled to raise his building beyond the height at which it stood when that consent decree was passed, is *res judicata*. But it does not follow from this that the Court will necessarily grant an injunction as was done in the former suit by consent of parties, for that is a matter personal to the defendant there, and other considerations may now be found warranting the adoption of a different course

Attorneys for the plaintiff —*Messrs. Madhowji, Kamdar & Co.*

Attorneys for the defendant —*Messrs. Edgelow, Gulabchand, Wadia & Co*

B. N. L.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr. Justice Hayward.

1911. [Sep]tember 4.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT, v SADASHIV ABAJI BHAT AND THREE OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS *

Survey and Settlement Act (Bom Act I of 1865), sections 25, 28, 37, 38 (1)—Land Revenue Code (Bom. Act V of 1879), sections 102, 106—Khoti village in Kolaba District—Survey and settlement—Introduction of "sanctioned" settlement—"Fixed or guaranteed"—Expiration of the period of "sanctioned" settlement—Continuance of the terms of the "sanctioned" settlement after the expiration of the period as still being sanctioned.

A question having arisen as to whether under the settlement of the khoti village in suit, which was sanctioned in 1863 and introduced in 1865 subject to all the

* First Appeal No 98 of 1905

(1) Sections 25, 28, 37, 38 of the Survey and Settlement Act (Bom Act I of 1865) are as follows —

25. It shall be lawful for an officer in charge of a survey to assess to the land revenue, under such general and local rules as may be in force in the survey under his charge, all lands cultivated or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year until the sanction of the Governor in Council shall have been obtained thereto, and

provisions of the Survey and Settlement Act (Bom. Act I of 1865), and thereafter for a fixed period of twenty-seven years, the Government was entitled on the expiration of the said period of twenty-seven years to insist upon the terms imposed upon the Khot as between him and his tenants under the settlement as still being sanctioned,

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ADAJI

Held, that in 1892 when the fixed period of the settlement sanctioned in 1863 and introduced in 1865 came to an end, the terms which had been imposed upon the Khot under section 38 of the Survey and Settlement Act (Bom Act I of 1865), when that settlement was introduced, remained in force, since the settlement itself must be deemed to have been then and still to have been sanctioned and that Government was within its rights in insisting upon the Khot accepting certain clauses in the kabulayat of that year.

FIRST appeal against the decision of R. S Tipnis, District Judge of Thana, in original Suit No 39 of 1893.

---

provided that it shall not be leviable from any land held and entered in the land registers as wholly or partially exempt from payment of land revenue, except to such amount as is in accordance with previous practice, or any law which has been, or may hereafter be, enacted relating to lands so held

29. It shall be lawful for the Governor in Council from time to time to lay down rules for the administration of the survey settlements not at variance with any provision of this Act, and to declare existing settlements and all assessments imposed according to sections 25 and 26 of this Act, fixed for any period not exceeding thirty years. The expiration of periods so guaranteed shall from time to time be published by authority of Government in the *Government Gazette*.

37. Whenever, in the Rutnagherry Collectorate and in the Ryghur, Rajpooree and Sankshee talukas of the Thana Collectorate, the survey settlement is introduced into villages or states held by Khots, it shall be competent for the Superintendent of Survey or Settlement Officer, with the sanction of the Governor in Council, to grant the Khot a lease for the full period for which the settlement may be guaranteed in place of the annual agreements under which such villages have *hitherto been held*, *and further, the provisions of section 36 in respect to the right* of permanent occupancy at the expiration of a settlement lease shall hold good in regard to those villages or estate

38 It shall also be competent to such officer, with the sanction of the Governor in Council, to fix the demands of the Khot on the tenant at the time of the general survey of a district, and the terms thus fixed shall hold good for the period for which the settlement may be sanctioned. But this limitation of demand on the tenant shall not confer on him any right of transfer by sale, mortgage, or otherwise, where such did not exist before, and shall not affect the right of the Khot to the reversion of all lands resigned by his tenant during the currency of the general lease.

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI

The facts were as follows:—

The plaintiff Sadashiv Abaji Bhat was the Khot of the village of Ambdoshi situate at Tale Petha in the Kolaba District. The khoti was originally conferred on Krishnaji Mahadev Mehendale, plaintiff's predecessor-in-title, by Peishwa Bajirav I under a grant of the year 1733. The Khots of the village, according to custom, recovered from the tenants *ardhel* (one-half of the crop) in the case of rice lands and *tirdhel* (one-third of the crop) in the case of *varkas* lands, or the rent agreed upon between the Khot and his tenants.

On the 16th June 1863, the Government of Bombay sanctioned survey rates in Tale Petha in which the village of Ambdoshi was situate. As a matter of fact, however, the rates were not actually introduced until 1865-66. On the 25th January 1865 the Survey and Settlement Act (Bom. Act I of 1865) came into force, section 3 of which declared the then existing survey settlements to be in force subject to the provisions of the Act. At the original survey the demands of the Khot were fixed by the Survey Officer purporting to act under section 38 of the Act. The Khot of Ambdoshi was offered a lease under section 37 but he refused the offer and passed to Government annual kabulayats from 1869-70, one of the terms of which was not to exact anything more from his tenants than the rates fixed under section 38 by the Survey Settlement Officers. The main conditions were as follows:—

2. The general assessment of lands has been recorded *in the* survey papers. In addition to that an additional revenue will be charged at the rate *of one anna* per rupee on the abovementioned estimated revenue as Local Fund assessment. The amount so assessed will be paid off by instalments as may be decided by the Collector of this District.

* * * * * * *

5. We shall pay the revenue about the general assessment of lands as stated above in the first two items, we shall receive dues *from the tenants of the same as* detailed below:—

(i) We shall collect the revenue in cash in the fixed number of instalments as the dues must have been entered in the survey papers as assessed from each one *of the lessees enjoying* fixed fees (Dharekaree)

(ii) Some lands *of those* now in the charge of the Khots have been *recorded* as standing in the names of the clients; and in pursuance *of section 34 of Act I*

of 1865, the assessment of these lands must have been entered in the names of those clients. We shall collect all those items of revenue with profits for the abovementioned years in accordance with the following details :—

(a) The tax on the ("khareep") autumnal harvest is rupee one and eight annas for profit : in all one rupee and annas eight : of that for the tax one rupee in cash, and as for the profit half a maund of ("Bhat") rice in the husk or six payalis calculated at the rate of one khandy for twenty rupees. Ten pice will be charged for each maund of the nett revenue and the profit

(b) The whole of the tax on lands of a superior quality in cash, and twelve annas for profit At this rate the nett revenue will be taken as half a maund or six payalis calculated at the market rate of rupees thirty one-half of that will be the Naglee corn, and the other Waree. The whole of the tax to be taken out of a rupee in case of profit

In this way the revenue will be levied from the tenants.

From the Government we shall get a certificate stating how much revenue is due from each ryot ; nothing in excess of that will be taken.

* * * * * * *

7. The due which will be levied from each ryot as stated in details above, will be in quantity exactly what must have been entered as due in the account of each ryot, in the records of the general assessment of lands We shall also enter in the book of each client what amount is due from him on account of the land assessment, before the instalments begin. We shall receive the revenue exactly as so stated and immediately on the receipt of the due, all corresponding (entry) will be at once made in the book If on enquiry it be found that we failed to do this, we shall pay to Government the fine which may be inflicted on us, but not exceeding rupees one hundred

8 If the Dharekaree do not give his land for cultivation for any reasons and is reduced to penury (or absconds) or dies without leaving a rightful claimant, and also if any of the clients of the Khot in charge of the same die and if there be no heirs to him if he absconds, we shall report that to the Mamlatdar Then we shall make the necessary inquiries for causing the corresponding mutations on the records. We shall enter the land to the account of the Khot We shall also obey any orders of the Government as to how that land is to be cultivated and how the fixed tax must be paid to the Government. But if the season for cultivation set in before any final orders are received about such lands, due arrangements as stated above will be made until the final orders of disposal are obtained.

* * * * * * *

10 All the trees that may be standing in the lands of the Dharekarees, other than timber and blackwood and those mentioned in the 9th item above, where the same are owned by them, must be admitted to be of their ownership All the other trees are owned by us as has been conceded by the Government. Where in any year, those trees of timber and blackwood be felled, after the wages are deducted, if the trees be from the ownership of the Dharekarees, one-third share of the other proceeds should be had by the Dharekarees, and where

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI.

the trees are not owned by the Dharekarees, the aforesaid one-third share will be given to us.

* * * * * * *

15 At present an appeal (a case) is being prosecuted about the khoti in the High Court. The management of our village should be conducted according to what may be decided there. *Till then we have agreed to carry on the management in accordance with the conditions stated in paras 1 to 14 above.*

On the 10th February 1870 the Collector of the District issued a *proclamation declaring that* the survey rates of Ambdoshi had been fixed and that they would continue for a period of twenty-seven years from the year 1865-66 to the year 1891-92 On the 15th March 1875 the Government published a notification under section 28 of the Act The period of twenty-seven years guaranteed expired on the 31st May 1892. The Khot was, thereupon, required to execute an annual kabulayat in the usual form, but he objected to the clause relating to rent and refused to pass the kabulayat An order for attachment of the village was, in consequence, issued on the 9th December 1892, but on the next day the plaintiff passed under protest a kabulayat in the usual form On the 28th November 1893 the plaintiff filed the present suit against the Secretary of State for India in Council praying for a declaration that (1) the terms which the defendant unauthorizedly compelled the plaintiff to insert in the kabulayat for 1892-93 being so entered under coersion the kabulayat was illegal, invalid and not binding on the plaintiff and (2) the plaintiff could not be compelled to pass such a kabulayat and the defendant was not competent to attach the plaintiff's village. He further prayed for an order that the defendant should not fix as between the plaintiff and his tenants the rents to be levied by the Khot from his tenants and claimed Rs. 400 for damages.

The defendant answered *inter alia* that under section 11 of the Revenue Jurisdiction Act (Bom Act X of 1876) the suit could not be entertained until the plaintiff had shown that he had preferred all such appeals allowed him by the law in force, namely, sections 203 and 204 of the Land Revenue Code (Bom. Act V of 1879), as it was possible for him to present within the time allowed by law for the suit; that the

plaintiff was not the owner of the village and not having accepted the lease tendered under section 37 of the Survey and Settlement Act (Bom. Act I of 1865) had no permanent interest in the village in suit, nor any interest beyond that of revocable agency; that Government had recognized the plaintiff's preferential right to officiate as Khot on an undertaking to perform the duties attached thereto by Government and Government could not be compelled to retain any person therein unless satisfied that such person was prepared to perform the duties required, that Government was justified in requiring, before re-admitting the plaintiff to the office, to fulfil the specified duties; that the plaintiff was bound under section 38 of the Survey and Settlement Act (Bom. Act I of 1865) by such terms as may be fixed by the superior officer as to his demand on tenants and the terms of the kabulayat objected to by him were consistent with the imperative requirement of the law; that the plaintiff had not sustained a loss of Rs. 400 and that the plaintiff was liable to forfeit his office on refusal to carry out the duties thereof

The suit was originally heard by Mr Beaman, who was then the District Judge of Thana, and he dismissed it with costs holding, on the first issue, that the plaintiff had not exhausted his remedies before bringing the suit.

From that decision the plaintiff preferred an Appeal No. 158 of 1895, to the High Court which, on the 18th November 1896, reversed the decree and remanded the suit for re-trial on the merits. After the remand the case was finally heard by Mr. R S. Tipnis, the District Judge, who after a very protracted inquiry found that the plaintiff was the *purdtan sanadi* Khot but not *vatandar* Khot and his predecessors-in-title were *purdtan sanadi* Khots of Ambdoshi, that the plaintiff was not the absolute owner of the khoti village of Ambdoshi but his interest in the said village was of limited proprietorship; that the plaintiff had an interest in the khoti village beyond that of a mere officer, agent or farmer; that the right of the plaintiff to manage the khoti was not conditional but was dependent on the fulfilment by him of the duties in connection with his

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI.

khotship and his right to the khotship was not forfeited by his refusal to undertake the duties of the Khot in any year; that there was a provision in the Survey and Settlement Act (Bom. Act I of 1865) for fixing, on certain conditions and for a certain term, the Khot's demands on the tenant, but the insertion of the obligation in that behalf in the required kabulayat for 1892-93 went beyond the provisions of the law and consequently gave to the plaintiff a cause of action to claim damages and not injunction, and defendant did not acquire any right to interfere between plaintiff and his tenants simply by virtue of his having registered tenant's names in the survey record; that the defendant was not estopped from denying plaintiff's claim by his conduct or by any valid agreement; that the plaintiff had a right to revert to the *Mamul vahivat*, though it might be inconsistent with that prescribed in section 38 of the Survey and Settlement Act (Bom Act I of 1865), on the expiry of the period of settlement, which period did expire in 1891-92, and the system adopted by Government for fixing the Khot's demands on the tenant at the survey was, when in force, inconsistent with the *Mamul vahivat*, that the plaintiff was entitled to Rs 400 for damages claimed in the suit and that the plaintiff was not bound to execute the required kabulayat for 1892-93 containing the objectionable parts of clauses 5, 7, 8, 10, 15, and by his refusal to execute the same, the plaintiff did not forfeit all his rights to the *khotship of or interest in the* village of Ambdoshi.

On the strength of the above findings the District Judge passed a decree in the following terms :—

1. That the annual kabulayat for 1892 93 executed under protest by plaintiff is not binding on him with regard to clauses 5, 7, 8, 10, 15 inserted therein, that is to say .—

Clause 5 is objectionable as in (sub-clause 2) 1892-93 plaintiff was entitled to *revert* to the practice of recovering customary rents (*Mamul vahivat*) from tenants of *khot nisbat* lands, and was not bound to restrict his demands on the tenants to specified amounts as laid down in sub-clause 2;

Clause 7 is objectionable and requires verbal alteration inasmuch as according to *Mamul vahivat*, assessment is recoverable from dharekaris and not khoti tenants;

Clause 8 is objectionable because according to *Mamul vahivat, khot nishat* lands lapse to the Khot without any special order in that behalf from the Collector;

Clause 10 is objectionable because plaintiff is entitled to the benefit of Mr. Dunlop's proclamation in respect of trees growing on *khoti khasgi* lands;

Clause 15 is objectionable because it is in the interest of the plaintiff and he does not want it to be inserted.

2. That the plaintiff should not have been, in 1892-93, compelled to pass the annual kabulayat containing the aforesaid objectionable clauses without his free consent.

3. That the plaintiff is not liable to pass an annual kabulayat containing the aforesaid objectionable clauses 5, 7, 8 after 1891-92, until Government in its executive capacity conforms to the provisions of the law now in force, *viz.*, section 38 of Bom. Act I of 1865, and legally exercises the power conferred upon it by the aforesaid section of the aforesaid Act

4. That the plaintiff's khoti village of Ambdoshi is not liable to attachment by Government should plaintiff refuse to pass any such aforesaid kabulayat in any year after 1891-92 on account of the insertion therein of the aforesaid objectionable clauses 5, 7, 8, unless and until Government legally conforms to the provisions of section 38 of Bom. Act I of 1865 or any other law in force at the time.

5. That in the state of law and rules having the force of law as existing in 1892-93 Government were not entitled to restrict plaintiff (the Khot) to specified demands on the khoti tenants of Ambdoshi.

This Court further orders that plaintiff do recover from defendant Rs. 400 as damages claimed in the plaint, and that each party should bear its own costs.

11th March 1905.

The defendant appealed.

Strangman (Advocate-General) with *G. S. Rao* (Government Pleader) for the appellant (defendant) —The principal question involved in the case is whether the rights of the plaintiff to levy assessment from his tenants are limited by the rates fixed under section 38 of the Survey and Settlement Act. If this point is decided in our favour there is an end of the case. The decision of the point depends upon the admissions of the parties, certain known facts and some provisions of law.

The village of Ambdoshi is in Rajpuri Taluka referred to in section 37 of the survey and settlement Act. That section empowers Government to introduce survey settlement, that is, to fix the rates as between Government and the Khot. The guarantee for the rates is fixed for a period not exceeding

1911.

SECRETARY OF STATE FOR INDIA *v.* SADASHIV ABAJI.

thirty years under section 28 of the said Act. That section corresponds with section 102 of the Land Revenue Code. Under section 37 a lease can be granted to a Khot for a period not exceeding thirty years. It is optional with the Khot to accept or not to accept the lease.

After the expiry of the period of guarantee, there is nothing in the Survey and Settlement Act or the Land Revenue Code which makes it obligatory on Government to make a fresh survey. If Government do not re-survey or re-assess, they can go on recovering the same rates as fixed at the original survey. The period guaranteed is guaranteed in favour of the Khot. Government can go on levying the same rates. There being no re-survey Government were entitled to call upon the Khot to pay the assessment fixed in 1865, which Government did by calling upon him to execute a kabulayat. The Khot objected to certain clauses in the kabulayat; he did not object to pay the sum of Rs 707-12 fixed in 1863 and introduced in 1865-66 The word in section 38 is "sanctioned" and not "guaranteed." So long as Government levied nothing more than what was fixed under section 27, the Khot had no right to levy anything more from the tenants than what was fixed under the section.

The District Judge was of opinion that "sanctioned" meant "guaranteed" His view was erroneous There is nothing in the law as to how sanction should be evidenced. In the present case sanction was clearly evidenced by the demand of Government on the Khot to execute a kabulayat as usual in 1892-93. This was a clear, definite sanction

We submit that the period of settlement must be deemed as sanctioned so long as Government goes on calling upon the Khot to pay at the previous rates, that is, to execute a kabulayat: see section 102 of the Land Revenue Code and sections 25, 28, 37 and 38 of the Survey and Settlement Act. Under section 25 when once the rates are sanctioned they may go on for ever subject to a guarantee that Government will not enhance the rates for a period of thirty years.

We contend, first, that no sanction was required at all *and*, secondly, if any sanction was required, Government's demand

to execute a kabulayat as usual with a threat was a sufficient sanction.

The construction put by the District Judge upon the sections of the Survey and Settlement Act was not correct.

D. A. Khare for the respondent (plaintiff) :—The proclamation issued in 1870 notified that the restriction was to hold good for twenty-seven years. The word in the proclamation is *tharav*, that is, agreement, settlement. Under section 38 of the Survey and Settlement Act some period has to be fixed for which the rates are to be limited.

"Sanction" means two things: one, sanctioning the settlement, and the other, sanctioning the period. Sanction for a further period nowhere appears For want of sanction Government had to issue a confidential resolution in 1895.

Section 38 requires an express declaration fixing the period of years. It requires an express sanction for the limitation of the Khot's demand on the tenant The period in section 38 must be the period in section 37.

The question still remains whether the Survey Officers have any power to limit the Khot's demands on his tenants.

The Khot's undertaking to be bound by the terms of the usual kabulayat, clause 15 in the kabulayat, had no meaning since the decision of Ambegaum suit. By passing the kabulayat the Khot did not accept the right of Government to interfere with the Khot's right as against his tenants-at-will. Government have no right to do that under section 38 of the Survey Settlement Act.

Government are estopped from pressing the Khot to pass kabulayats as they want.

BEAMAN, J.—This case has assumed very large proportions, but we think it can be disposed of in few words We think, however, that we ought not to dismiss it without paying a tribute to the great thoroughness and ability with which the learned Judge, who tried this suit, has dealt with the enormous mass of materials laid before him. In the argument before us it has become only too clear that an undue and quite an

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI.

unnecessary strain was put upon that learned Judge, owing to the course taken by the litigation below. The whole of his learned and elaborate enquiry into the character of this particular khoti, is for our present purposes entirely irrelevant. So too is much else in that judgment, which, however, may not prove to be labour in vain, since it will always be useful for purposes of reference when kindred questions arise.

The point before us, however, is extremely simple, and turns upon the construction of sections 25, 28, 37 and 38 of Bombay Act I of 1865, and sections 102—106 of the Land Revenue Code (Bombay Act V of 1879) Briefly put, it amounts to this. Whether under the settlement of this khoti village, which was sanctioned in 1863 and introduced in 1865, subject to all the provisions of Act I of that year, and thereafter fixed for a period of 27 years, the Government was entitled on the expiration of the said period of 27 years to insist upon the terms imposed upon the Khot as between him and his tenants under the settlement as still being sanctioned

In the Court below the learned Judge has discussed this point very elaborately; but we cannot help thinking that he has entirely overlooked the intention of the Legislature in using in certain sections the words "fixed or guaranteed" and in other sections the word "sanctioned" In his opinion "sanctioned" at the conclusion of section 38 of Bombay Act I of 1865 is synonymous with "guaranteed or fixed"; and if this interpretation be correct, it would follow that the terms imposed by the settlement of 1863 upon the Khot ceased to be in force at the expiration of the term for which that settlement was fixed or guaranteed. That would be in the year 1892, so that in his view the plaintiff-respondent was justified in refusing to renew kabulayats including those terms after that year. We think, however, that the contention of the learned Advocate-General on behalf of Government is clearly right and must prevail. If we look to the effect of all the sections we have mentioned, taken as a whole, it appears to us that there can be no serious doubt but that the construction placed upon the concluding words of section 38 by the Advocate-

General is not only the natural and right construction, but also is essentially equitable and in conformity with the plain policy of Government. The various steps taken under these sections may be thus briefly described.

The officer entrusted with preparing a survey settlement proposed his rates to Government and these rates were only enforceable as assessment for one year until they were sanctioned by Government. When they were so sanctioned, the settlement became a sanctioned settlement within the meaning of the clear words of section 38, and that meant no more than that Government had accepted the various rates of the assessment proposed by the Survey Settlement Officer. Such a sanctioned settlement might remain in force for one year or for 50 years. But in order to give some fixity to tenure, for those holding under it, the law provided that Government might in their interests fix or guarantee those rates for a definite period, not exceeding, under Bombay Act I of 1865, 30 years. That was clearly intended to be in the interests of those paying *assessment and holding under the settlement.* Section 38 of the same Act together with section 37 appear to have exclusive reference to khoti villages It was further enacted that at the time of the general survey the Settlement Officer might limit the rent to be taken by the Khot from his tenants. And the section goes on to say that all the terms so imposed shall hold good during the period for which the settlement may be sanctioned.

Now section 37 of the same Act provides for fixing the dues to be paid by the Khot to the Government. There we find a provision made for guaranteeing or fixing the period of such sanctioned settlement. And it is very important to discriminate in all these sections between the carefully and no doubt advisedly made choice of the words "sanctioned" on the one hand and "fixed or guaranteed" on the other.

If we turn to section 25 of the Act, we shall find that it provides for the sanctioning of the settlement. If we turn to section 28 of the Act, we shall find that it provides for fixing or guaranteeing the period of that settlement up to a term not

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI.

exceeding 30 years. So again in the later Act, Land Revenue Code (Bombay Act V of 1879), in section 102 we find in the first sentence provision made for sanctioning the rates proposed by the Settlement Officer, which is tantamount to sanctioning the settlement within the meaning of section 25 of Bombay Act I of 1865 And the section then goes on to provide for fixing the period of the settlement which is tantamount to re-enacting what was provided in section 28 of Bombay Act I of 1865. Thus we think that there is a very fair distinction between "fixing" a period during which a sanctioned settlement is to continue in force unmodified, and "sanctioning" a settlement which goes no further than accepting the rates proposed by the Settlement Officer

We have then to consider what the effect of section 38 of Bombay Act I of 1865 is when a settlement has been sanctioned and a period has been fixed and that period has expired. That is what has happened here. The settlement was, as we have said, sanctioned in 1863. It was introduced in 1865 and a period of 27 years from that day was fixed. During that period the plaintiff-respondent does not deny that he was bound under section 38 to comply with all the terms regulating his right to levy rent from his tenants proposed under the sanctioned settlement. But his contention is that when the period fixed expired, those terms no longer remained in force, since section 38 says that they shall only hold good during the period for which such settlement may be sanctioned. But what is the effect of the fixed period terminating before any revised settlement has been introduced? Surely it can be no other than to continue the sanctioned settlement relieved from the quality of fixity. That is to say, that the position of those holding under it is, until interfered with, precisely the same as it was at the commencement of the fixed period, but less secure since at any day Government might intervene, revise the settlement and enhance the rates and assessment. So long, however, as it does not do so, we must presume that the settlement originally sanctioned continues to be sanctioned, and we think, therefore, that the Advocate-General is right in saying that no proof is needed, even of any implied sanction on the part of Government, so long

as the other side can show nothing to the contrary. Were, however, any proof of implied sanction necessary, the Advocate-General points out that it is to be found in the fact that immediately upon the expiration of the fixed period Government demanded the assessment from the Khot on the same terms as before, and this, it is said, is convincing proof of the implied intention of Government to continue the sanction given to the assessment in 1863, pending the introduction of any new and revised settlement which might later be found necessary.

On both these lines of argument we are disposed to agree with the learned Advocate-General. We think too that in adopting them we are giving effect to the real equity of the case and the intended policy of Government. For, if we were not to do so, the effect would be that since no revised settlement has been introduced, the Khot would be able to retain the benefit of the low rate of assessment fixed upon him in 1863, while he would be at liberty to exact from his tenants, as indeed he wishes to do now, up to half the actual produce of their cultivable lands. That, we feel sure, never could have been the intention of Government, nor do we think that the words used in the Legislative enactments compel us to any such conclusion. Rather we are clearly of opinion that the actual words used, when all the sections are read together, naturally do bear the meaning and construction which we have been invited to put upon them by the learned Advocate-General.

We, therefore, hold that in 1892, when the fixed period of the settlement sanctioned in 1863 and introduced in 1865 came to an end, the terms which had been imposed upon the Khot under section 38 of Bombay Act I of 1865, when that settlement was introduced, remained in force, since the settlement itself must be deemed to have been then and still to be sanctioned: and that Government was within its rights in insisting upon the Khot accepting clauses 5, 7 and 8 in the kabulayat of that year. These are the clauses which are now chiefly in dispute.

As to clause 15 the learned Judge below found that it was in the interest of the plaintiff, and as he did not desire that it

1911.

SECRETARY OF STATE FOR INDIA v. SADASHIV ABAJI.

should be continued, it ought to be struck out of the kabulayat. To that the Advocate-General on behalf of Government has no objection.

As to clause 10, which is the only other clause in the kabulayat in dispute, the Advocate-General on behalf of Government accepts the finding of the learned Judge below as to the plaintiff's rights to trees That clause, therefore, must be modified in accordance with what has been found by the learned Judge of the first instance.

On behalf of the plaintiff-respondent the only plea taken by Mr. Khare has been that of estoppel, but we are totally unable to find anything in the materials, upon which he has sought to rest his argument, even resembling a legal estoppel; and Mr. Khare himself after very little argument virtually conceded that it was no true case of estoppel, though his client felt that he had some legitimate grievance in the manner in which his petitions and complaints to Government had been dealt with while the Ambdoshi case was under consideration With that, we think, we have nothing to do in this Court.

The result, therefore, will be that subject to the excision of clause 15 in the kabulayat and the modification indicated in clause 10 the plaintiff's suit in all respects fails and must now be dismissed with all costs throughout, including costs of the appeal and the cross-objections.

The deposit of 400 rupees in the Thana Court may now be refunded to the defendant.

Suit dismissed. Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

GOPAL GHELA (ORIGINAL DEFENDANT), APPELLANT, *v.* RAJARAM AMTHA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1911. *September 21.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 10A(1)—Written instrument—Oral evidence to vary the terms—Enactment relating to procedure—Retrospective effect—Pending proceedings—Suit—Appeal.

The law embodied in section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is one of procedure, and being retrospective in effect applies to pending proceedings whether in a suit or an appeal.

SECOND appeal from the decision of Vadilal T. Parekh, First Class Subordinate Judge with appellate powers, at Broach, confirming the decree passed by C. M. Jhaveri, Subordinate Judge at Vagra.

This was a suit to redeem a mortgage dated 1869. The deed was in form an out-and-out sale. The plaintiffs alleged that there was a contemporaneous oral agreement between the parties to treat the sale-deed as a deed of mortgage. The

* Second Appeal No. 609 of 1910.

(1) The section runs as follows:—

Section 10A.—Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision:

provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction:

provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

1911.

GOPAL GHELA v. RATARAM ANTHA.

defendant contended *inter alia* that the deed in question was what it was meant to be a sale-deed.

The Subordinate Judge allowed the oral agreement to be proved and held that the transaction was a mortgage. He took accounts under the provisions of the Dekkhan Agriculturists' Relief Act, 1879; and finding that the debt was satisfied, ordered the defendant to hand over the property to the plaintiffs. This decree was confirmed on appeal.

The defendant appealed to the High Court.

Whilst the appeal was pending in the High Court, the provisions of section 10A of the Dekkhan Agriculturists' Relief Act, 1879, were made applicable to the Broach District.

CHANDAVARKAR, J.—Both the lower Courts have misunderstood the decisions of this Court on the question whether and when oral evidence is admissible to prove that what purports to be a deed of sale represents, according to the true intention of the parties, a transaction of mortgage. The effect of those decisions is that, where section 10A of the Dekkhan Agriculturists' Relief Act does not apply, such evidence is admissible, under proviso 1 to section 92 of the Indian Evidence Act, only when the element of fraud or other similar element mentioned in the proviso exists to invalidate the deed. The Subordinate Judge, First Class, who decided this case on appeal, has relied in support of his view on some *dicta* in one of the judgments in *Sangira Malappa* v. *Ramappa*[1] without carefully noticing their context; and the result of the Subordinate Judge's decision is that he has treated the deed of sale as one of mortgage on the evidence of a contemporaneous agreement between the parties contradicting the terms of the deed. That is not the law laid down in *Sangira Malappa* v. *Ramappa*.

The decree, therefore, would have to be reversed and the suit for redemption brought by the respondent dismissed, unless we allowed the contention of his pleader that he was at this stage entitled to rely on and invoke the aid of section 10A of the Dekkhan Agriculturists' Relief Act. That section was not in

(1) (1909) 34 Bom 59.

force in the district, from which this case comes, either when the suit was filed or when the appeal to the District Court was heard and decided. It has been applied to the district since the disposal of the appeal; and we are asked to confirm the decree on the ground of the section.

The question is whether in second appeal we have jurisdiction to give effect to the section, which is now part of the law of the district but which was not the law when the case was pending in either of the Courts below.

The section provides that the Court shall have power to admit evidence of the kind mentioned in it "whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party" that any transaction in issue is in reality other than what it is ostensibly. Is an appeal or a second appeal a stage of a suit or proceeding within the meaning of the section?

In *Chinto Joshi* v *Krishnaji Narayan* (1), followed by Sargent, C. J., and Nanabhai Haridas, J., in *Rustomji Burjorji* v. *Kessowji Naik*(2), West, J., said (at p. 215) —

"When judicial inquiry has reached its intended close in an adjudication, requiring thenceforward in theory only a ministerial or coercive exercise of authority to give it practical effect, the party who strives by an appeal to unsettle again the legal relation, which in itself has by the act of the Court become settled, may fairly be regarded as instituting a new proceeding Such has been the view of some eminent authorities. But even on that point there have been opinions to the contrary, which are supported by the consideration that the legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity"

This latter view has the sanction of some of the latest decisions of the Courts in England. In *Hood Barrs* v *Heriot*(3), explained by Ridley, J., in *Nunn & Co.* v. *Tyson* (4), the House of Lords held that "an appeal was nothing but a step in an action or proceeding already instituted, and was not the institution of fresh proceedings" And Davey, L J, in his judgment in the former case in the Court of Appeal explained that "an appeal is in reality in the nature of a defence by the

(1) (1879) 3 Bom 214

(2) (1884) 8 Bom. 287 at p. 293

(3) [1897] A C 177.

(4) [1901] 2 K. B 487.

1911.

GOPAL GHELA v. RAJARAM AMTHA.

person against whom an order has been made." See *Hood Barrs* v. *Cathcart*(1).

Whichever view we adopt, whether an appeal or second appeal is regarded as a fresh proceeding, not a continuation of the suit, or whether we treat it as a step in or stage of the suit itself, the result is the same for the purposes of section 10A of the Dekkhan Agriculturists' Relief Act. It is either a stage of a suit or it is a fresh proceeding; and if the section is in force when the appeal or second appeal is pending, the Court has power to act upon its terms in deciding the appeal The law embodied in the section is one of procedure, and, being retrospective in effect, applies to pending proceedings.

On these grounds, accepting the finding of fact of the Court below that the transaction in dispute, ostensibly a sale, represented a mortgage according to the true intention of the parties, we must confirm the decree with costs.

Decree confirmed.

R. R.

(1) [1894] 3 Ch 376 at p. 380

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor.

1911. *October 3.*

ISMAILMIYA BIN BANNEMIYA (ORIGINAL PLAINTIFF), APPELLANT, v. WAHADANI BEGAM, A MINOR, BY HER GUARDIAN FATHER KUDBUDIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Religious institution—Khanga attached to Darga—Right of management—Exclusion of females—Prevailing usage—Usage as indication of the direction of the founder.

The right of management of religious institutions such as Khangas attached to Dargas is to be decided according to the prevailing usage, that usage being taken as indication of the direction of the founder. Even in cases where appointments have been regularly made by the last holders an inquiry into the usage governing such appointments has been considered relevant.

* Second Appeal No 217 of 1905.

Shah Gulam Rahumtulla Sahib v. *Mahommed Akbar Sahib*(1), *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hasan Edrus*(2), *Sayad Muhammad* v. *Fatteh Muhammad*(3), referred to.

SECOND appeal against the decision of E. M. Pratt, District Judge of Khandesh, reversing the decree of G. R. Datar, Subordinate Judge of Nandurbar.

Suit relating to a share by rotation in the management of certain *wakf* property.

At Nandurbar in the Khandesh District there is a Darga (Pirsthan) of a Mahomedan Pir (saint) known as Pir Mahamad *alias* Garibbun Nawaz. For the maintenance and dignity of the Darga and the family of the Pir the ruling power granted as *wakf* three villages, namely, Hatnur, Sundarde and Sonare, and some fruit trees, the income of which was enjoyed by the members of the family from time immemorial. In or about the year 1854 two brothers Budhanmiya and Bannemiya were in management of the property, and the management continued undisturbed between them for some years, but eventually disputes having arisen it was decided by the High Court in 1870 that each manager should hold his office for periods of three years in turn. Bannemiya died in 1874 leaving him surviving four sons, Ismailmiya, Abdulkadarmiya, Hafizmiya and Yasinmiya. Ismailmiya succeeded to Bannemiya's share in management jointly with Budhanmiya. Budhanmiya died in the year 1884 and the Collector of Khandesh passed orders substituting his eldest daughter Jinatbegam in the revenue books as the holder of the villages, but she being a female was not allowed to step in the shoes of her father when Ismailmiya's turn of management came to an end in June 1885. The Collector, however, in October 1885 passed orders in favour of Jinatbegam, and Ismailmiya had to retire from the management to make room for her. After Jinatbegam's death the names of her daughters Rahimanbi and Wahadani were in succession substituted for hers in the revenue records. Owing to the recognition of Wahadani's right as manager in rotation

(1) (1875) 8 Mad. H. C. R. 63. (2) (1888) 13 Bom. 555.
(3) (1894) L. R. 22 I. A. 4.

1911.

ISMAILMIYA v. WAHADANI BEGAM.

in place of Budhanmiya, the two elder sons of Bannemiya, namely, Ismailmiya and Abdulkadarmiya, brought two suits, Nos. 407 and 408 of 1897 respectively, against Wahadani and others. In Suit No. 407 the plaintiff Ismailmiya sought to establish his right alternately with his three brothers to a fourth share of the turn of management on the ground that Wahadani, being a female, had no right to claim any share in the management of the property which was *wakf* and from which females were excluded according to the custom of the family

The defendants contended *inter alia* that the suit was not maintainable owing to non-joinder of parties and denied the plaintiff's right to manage the property

The Subordinate Judge found that having regard to Mahomedan Law, the custom of the family and the nature of the office and service, the plaintiff was entitled to the management of the property together with his brothers to the exclusion of the female descendants of Budhanmiya and that the suit was not defective for want of parties. He, therefore, allowed the claim

On appeal by the defendants the District Judge found that (1) the plaintiff had not proved a family custom excluding females from succession, (2) females were entitled to succeed under Mahomedan Law and (3) the plaintiff was not entitled to a fourth share of the office held by Wahadani. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

Jinnah with *N. M. Patvardhan* for the appellant (plaintiff).

Tyabji with *N. V. Gokhale* for respondents 1 and 2 (defendants 1 and 5).

SCOTT, C. J. :—The claim in this suit and in Suit No. 408 of 1897 is that the defendants Nos. 1 to 5 be ordered to give to the plaintiff a turn of one-fourth share of the management of certain villages which the defendant Wahadani carries on

The facts found by the lower Courts are that the villages referred to in the prayer are three villages assigned by the

ruling power in the 18th century for the support of a Darga and *Khanga*. The *monastery was already attached to the* Darga prior to 1708, the year of the first recorded grant of a village by the ruling power. In that year a Firman of the Emperor Shah Allum was issued, whereby the village of Hatnur was granted to Hafizulla for expenses in connection with Fakirs and the monastery as "money payable for the maintenance of Syed Hafizulla, one of the children of Kutub Rubbini." The village of Sundarde was granted in the year 1745 to Mahamad Yasin who is stated by the lower Court to have been a brother of Hafizulla, and the village of Sonare was also granted to Mahamad Yasin, but the date of that grant is not given. Abdulla, the eldest son of Mahamad Yasin, was in possession as manager of the villages and the institution in the year 1823. In 1827 it appears that the management was being enjoyed by the three sons of Abdulla—Masumiya, Hajimiya and Bismilla Of these, Hajimiya and Bismilla predeceased Masumiya, and Masumiya's management ceased on his death in 1838.

The villages were then taken into the management of the Collector and in the year 1840 were handed over by that officer to Masumiya's eldest son Janimiya He died in 1842, and a dispute then arose between Masumiya's second son Ghasitamiya and Bismilla's eldest son Budhanmiya. The Collector decided the dispute in favour of Ghasitamiya who was installed as manager and remained in possession until 1849, when he died. His death exhausted the male descendants of Masumiya. A dispute then arose between the widows of Janimiya and Ghasitamiya on the one hand, and Budhanmiya and Bannemiya, the elder sons of Bismilla, on the other, with regard to the right of management. The Collector again was the person who decided the dispute His decision was that the management should be with Budhanmiya and Bannemiya, and that the widows of Janimiya and Ghasitamiya should be entitled only to maintenance. This was in 1854, and the management continued undisturbed between Budhanmiya and Bannemiya for some years, but eventually disputes occurred which led to litigation. The disputes were finally settled in 1870 by the

1911.

ISMAILMIYA v. WAHADANI BEGAM.

family is entitled to a share in the management, if not always to a share exclusive of his younger brothers There have been cases, as has been pointed out, of exclusive management by eldest sons and cases of collective or alternate management between brothers. The plaintiff has hitherto been the manager for the triennium in which his father Bannemiya would have been entitled to manage had he been alive, but he does not now, as he says on the ground of expense, claim to manage during the whole triennium for which Budhanmiya would have managed if he had been alive. He only claims to manage alternately with his three brothers during each such period. In paragraph 12 of his plaint he states that being the eldest son in the male line and it being customary in his family that the Wahivat should be carried on only by that member in the male line in whose name the villages may be standing, he is entitled to Wahivat, but owing to short funds only claims one-fourth.

The learned District Judge appears to have overlooked this allegation in the plaint, for he says that the plaintiff has not alleged a custom of succession to the office by inheritance in derogation of the Mahomedan Law.

As we understand the case, the plaintiff's contention was entirely based upon the usage prevailing in the family as to the right of management. Instances of alternating management are not wanting in the family and rotation of this kind is entirely in accordance with the custom of the country in such matters

The decision of the lower Court leads to a situation of unnecessary difficulty. It holds that Wahadani is not entitled to the management, but confirms her for periodic terms of three years in possession of the property as against the two eldest male members of the family.

We hold that the female defendants are not entitled to manage. The plaintiff is entitled to manage, if not exclusively, at all events, by arrangement with his brothers. The right of females to participate in surplus revenues in the hands of the manager has not been disputed and is not in question in

the suit. We reverse the decree of the District Judge and restore that of the Subordinate Judge with costs throughout on the defendants who contested the plaintiff's claim. 1911. ISMAILMIYA v. WAHADANI BEGAM.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

WASUDEV LAKSHMAN BHAGVAT AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GOVIND MAHADEV GHATE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1911. *October* 4.

Land Revenue Code (Bom Act V of 1879), sections 3 (11), 109, 197 and 217[1]—*'Holder'—A person in whom a right to hold land is vested—Occupants—Entry in the revenue register—Misunderstanding of an order—'Oversight'—Rectification of the register—Natural justice.*

The term 'holder' as defined by section 3 (11) of the Land Revenue Code (Bom. Act V of 1879) signifies the person in whom a right to hold land is vested,

---

* Second Appeal No. 252 of 1909.

[1] Sections 3 (11), 109, 197 and 217 of the Land Revenue Code (Bom. Act V of 1879) are as follows —

3 In this Act, unless there be something repugnant in the subject or context—

* * * * * * *

(11) "Holder" or "land-holder" signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons, or for the public; it includes a mortgagee vested with a right to possession.

109. The survey officer, or, if the survey settlement have been introduced under the provisions of section 103 by the Collector, or Assistant or Deputy Collector, the Collector or Assistant or Deputy Collector shall at any time correct or cause to be corrected any clerical errors, and any errors which the parties interested admit to have been made in the settlement register;

he shall also receive and inquire into all applications made to him at any time within two years after the introduction of the survey-settlement for the correction of any wrong entry of a registered occupant's name in the said register, and if satisfied that an error has been made, whether through fraud, collusion, oversight

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

Where persons are not 'holders' their claim as occupants cannot be supported by section 217 of the Land Revenue Code (Bom. Act V of 1879).

Where an entry in the revenue register was due to a misunderstanding of a certain order,

Held, that the cause of the error being of the same nature as 'oversight' falling within the description of errors in section 109 of the Land Revenue Code (Bom. Act V of 1879), the rectification of the register, so as to bring it in accord with the order passed after hearing both parties, was not contrary to natural justice. It was a case in which the revenue officer concerned was authorized under section 197 of the said Code to dispense with any judicial or quasi-judicial inquiry.

SECOND appeal against the decision of F. X. DeSouza, District Judge of Thana, reversing the decree of S. J. Kharkar, Subordinate Judge of Pen

The plaintiffs sued to obtain a declaration of their title to the *varkas* lands in suit situate at the village of Ramraj and sought to restrain the defendant from obstructing their enjoyment thereof and for restoration of possession if it were held that the possession of the lands was with the defendant at the date of the suit. The plaintiffs alleged that the said

or otherwise, shall correct or cause the same to be corrected, notwithstanding that all the parties interested do not admit the error, but he shall not receive any such application at any time after two years from the date of the introduction of the survey settlement, unless good cause be shown to his satisfaction for the delay in making such application, and no such correction of the said register shall be made in consequence of any application made after the said period of two years, *except with the previous sanction of Government.*

197. An inquiry which this Act does not require to be either formal or summary, or which any revenue officer may on any occasion deem to be necessary to make, in the execution of his lawful duties, shall be conducted according to such rules applicable thereto, whether general or special, as may have been prescribed by the Governor in Council, or any authority superior to the officer conducting such inquiry, and, except in so far as controlled by such rules, according to the discretion of the officer in such way as may seem best calculated for the ascertainment of all essential facts and the furtherance of the public good.

217. When a survey-settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends, shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to occupants and registered occupants shall be applicable, so far as may be, to them.

lands belonged to one Shivram Raghunath Sahasrabuddhe and were in his possession and *vahivat* as owner; after Shivram's death, in 1901, his trustees and executors sold the lands by public auction and plaintiffs became purchasers thereof under a sale-deed, dated the 18th October 1903, in the name of plaintiff 4, Balkrishna Govind Ghate They further alleged that the defendant, who was the inamdar of the village of Ramraj in which the lands were situate, was only entitled to receive assessment and had no other rights over the lands; still the defendant obstructed plaintiff's enjoyment and himself exercised such rights as cutting trees, etc., and was setting up his own title Hence the suit

The defendant replied that as inamdar he was the owner of all the *varkas* lands in the village including those in suit, that Shivram Raghunath Sahasrabuddhe had no right to or *vahivat* over the plaint lands, that Shivram's executors sold only rice lands and not *varkas* lands, that in the plaintiff's sale-deed the *varkas* lands were improperly included, that the plaintiffs had got no valid title and that the suit was time-barred.

The Subordinate Judge found that the plaintiffs had not proved their title to and possession of the lands in dispute and that the defendant had proved his title and possession. He, therefore, dismissed the suit. In support of his conclusion he relied upon the decision in *Vasudev* v. *The Collector of Thana*[1] and on an unreported interlocutory judgment in second appeal No. 214 of 1903.

On appeal by the plaintiffs, the District Judge concurred with the Subordinate Judge in his view of the case but the case was remanded for the following reason —

There is, however, another aspect of the case which has not been noticed in the judgment of the lower Court nor touched in the arguments at the Bar. I refer to the position created by the introduction of the revenue survey in the village on 9th July 1894 and its legal effect on the rights and liabilities of the parties.

For a right comprehension of this phase of the case, the following facts are essential. The defendant acquired the village in the year 1892 by purchase of a 14 annas 6 pies share and mortgage of the remainder At the request of his

(1) (1879) P. J. 274.

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

predecessor, survey operations had been commenced in 1887, the jungle *Kharda* (exhibit 188) was prepared by the survey officers in 1891, village form No. V (*exhibit 189*) was prepared from this in 1893-94 and the survey was declared on 9th July 1894.

It is admitted that in the papers as originally prepared, the plaint lands were entered in the khata of Shivram, and evidence of the Circle Inspector (exhibit 58) and the manager of the inam village (exhibit 79) is relied on to show that the entries were made after due inquiry as to the *vahivat* and with the acquiescence of the then inamdar.

The present defendant however was not content that all the *varkas* land in the village should be entered in the names of private Khatedars. He made an application (exhibit 219 dated 23rd July 1894) to the Mamlatdar, complaining that some *varkas* lands had been wrongly entered in the survey records in the name of the tenants, and he submitted a statement (exhibit 150) of the lands which he alleged were so wrongly entered. It is important to notice that in this application the defendant expressly disclaimed any interest in those *pot varkas* pieces which are in kharif numbers and which were entered in the names of the tenants. Accordingly we find that in the statement (exhibit 150) put in by him out of the plaint lands, he takes objection to only five plots, *viz*, survey Nos. 17 (4), 22 (2), 43 (10), 50 (1 and 4), measuring 16 acres 39 gunthas in the aggregate being entered in Shivram's name. The revenue authorities made certain departmental inquiries (*vide* exhibits 209 to 219), it is alleged that the inquiry was entirely *ex parte* and that the tenants were not made parties thereto. Eventually orders are said to have been passed in the year 1895 directing that the records should be corrected by entering all the *varkas* land in the inamdar's name, and exhibit 189 was accordingly so corrected. Exhibit 207 is a copy of the corrected record.

It is pointed out that the corrections then made were admittedly erroneous at least in part, for we find that on 2nd March 1896 the defendant himself made an application (exhibit 221) to the Mamlatdar, bringing to his notice that certain kharif lands to which he had no claim had been wrongly entered in his name; that entries were made in the inamdar's name of certain *pot varkas* pieces in kharif lands, title to which he had expressly disclaimed in his application (exhibit 220); that the inquiries made by the Collector as disclosed in exhibits 209 to 219 proceeded entirely on a wrong basis inasmuch as it is assumed that this was a revision survey; whereas, as a matter of fact, it was the first survey introduced in the village, and that in any case the corrections were irregular and could not have the effect claimed for them since the *varkas* lands are shown as *khalsa* and entered in the name of Laxman Narayan (the defendant) in his own name and not in the name of inamdar as such, although defendant was the owner of a 11 annas 6 pies share only in the village.

It is argued that by the introduction of the survey in 1894, Shivram became the occupancy tenant of the plaint lands under the joint operation of sections 103 and 217 of the Land Revenue Code; that the correction in the records subsequently made was *ultra vires* and illegal having regard to the provisions of section 107 and that the defendant is estopped from disputing that Shivram was an occupancy

tenant of his *varkas* lands by the acquiescence of the former inamdar in the declaration of his status as such, since it was only on that understanding that Shivram consented to become the occupancy tenant of the kharif lands.

But as the phase of the case was not touched in the lower Court, it is necessary that it should go down for further evidence and finding on the following issues :—

(1) What were the survey papers read out to the ryots when the survey was declared on 9th July 1891?

(2) Whether the introduction of survey invested Shivram with the rights of an occupancy tenant in the plaint lands having regard to sections 103 and 217 of Bombay Act V of 1879?

(3) When was the correction made in the survey records on the application of the defendant?

(4) Whether the correction was illegal and *ultra vires* having regard to the provisions of section 109, Land Revenue Code?

(5) Whether the correction was with the knowledge of Shivram; if not, can it affect Shivram's rights?

(6) Whether the former inamdar acquiesced in the entry of the plaint-varkas lands in Shivram's khata?

(7) If so, is the defendant estopped from disputing the entry now?

Findings to be certified within two months.

The Subordinate Judge having forwarded his findings, the District Judge found on the said issues as follows :—

(1) Village form No. V, copy of which is exhibit 189.
(2) In the affirmative
(3) Between 27th August 1895 and 4th September 1895.
(4) In the affirmative.
(5) In the negative
(6) In the negative.
(7) In the negative.

With respect to the finding on issue 4 the District Judge remarked :—

Issue 4.—This issue mainly turns upon the correct interpretation of section 109, Land Revenue Code. The admitted facts are that, on the same day as the introduction of survey settlement in his village, the defendant made an application to the Collector to have all *varkas* lands, including those entered in Shivram's name, transferred to his own. Thereupon he was directed by the Mamlatdar to be present with his evidence on 17th July (*vide* exhibit 222); exhibit 219 is his statement before the Mamlatdar made on 23rd July that he was in the habit of collecting the produce from all *varkas* land but that he laid no claim to *pot varkas* lands, which class of lands he accordingly omitted in the statement (exhibit 150) submitted to the Mamlatdar on the same day. So far, then, as the *pot varkas* lands in

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

suit are concerned, *viz*, survey No. 4 (phalni Nos. 1 and 3), 11 (1), 12 (1 and 2), 418 (3) and 51 (1) there was no application at all made by the defendant to have a mutation of names effected in his favour.

The nature of the inquiry made by the authorities is disclosed on a perusal of exhibits 224, 229, 225, 223. It appears from these exhibits that the Collector forwarded the application of the defendant to the survey authorities for disposal. Those authorities did not give any notice to Shivram or any other registered occupant who were interested, they merely referred to earlier orders Nos. 1460 and 1461 (dated 15th October 1892) in which the Superintendent had directed that all lands, kharif as well as varkas in both villages, should be entered in the inamdar's name, and finding that these orders were untenable on the face of them they fell back on the ledger for the year 1888-89 and directed that there should be a mutation of names of registered occupants in conformity with the entries in that ledger. The effect of this order was that the elaborate inquiries made by the survey officers as a preliminary to the introduction of survey on 9th July 1894 were superseded and the *status quo ante* restored by a stroke of the Superintendent's pen.

It was obvious that this procedure would result in grave irregularities; the defendant himself pointed out to the Mamlatdar that certain kharif land to which he had no title was wrongly entered in his name (*vide* his application, exhibit 221, dated 2nd March 1896). I have above shown that several plots of *pot varkas* lands to which defendant had no claim were also entered in his name. We have now to see what is the legal effect of a mutation of names effected in the manner above summarized.

This question must be answered by a reference to the terms of section 109, Land Revenue Code, which is the only section empowering corrections to be made in the settlement register. We are here concerned with clause 2, the requisites of which seem to be (1) an application for correction to be made to the survey officer or revenue officer, (2) an inquiry by the officer who receives the application, (3) proof that the error has been made through fraud, collusion or otherwise.

There can be no ambiguity as to the first requisite above enumerated.

Turning to the second requisite, it seems to me that the inquiry to be held should be of a judicial or a quasi-judicial character, because the concluding portion of the clause "notwithstanding that all parties interested do not admit the error" contemplates that an opportunity should be given to the parties interested to show cause against the application.

Mr. Shingne contends that the section should be construed in the light of the provisions of sections 193—197, Land Revenue Code, and that the inquiry contemplated being neither a "formal" nor a "summary" inquiry within the *meaning* of those sections need not necessarily be of a judicial or quasi-judicial character. He further refers to the analogous provisions of section 24 of the Registration Act (III of 1877), and argues that when the legislature has conferred a *discretion* on certain affairs, it is not for the Courts to question the exercise of *that discretion* by those officers. In support of this contention, he cites I. L. R. 21 Bom.

69, 699 and 6 All. 460. This argument involves an obvious confusion between the conditions precedent to the exercise of discretion on the one hand and the mode in which the discretion is exercised on the other. It is always the duty of the Courts to determine whether the conditions prescribed by the legislature before discretion can be lawfully exercised have accrued though the Courts will generally be loth to interfere with the exercise of discretion in a particular manner.

As to the third requisite I am of opinion that the phrase "or otherwise" should be construed so as to apply to causes *ejusdem generis* with the preceding causes and that a correction can be made under section 109, Land Revenue Code, only when an error has been made through fraud, collusion, oversight or other causes of a like nature. To hold otherwise would be to clothe the Assistant or Deputy Collector with a general power of revision over the results of the survey operations which would entirely defeat the scheme of the Land Revenue Code.

If this is the correct interpretation of section 109, Land Revenue Code, it is obvious that the mutation of names with regard to survey No 4 (1 and 3), 11 (1), 12 (1 and 2), 48 (3), 51 (1) was *ultra vires*, because there was no application for correction with regard to them, while with regard to the remaining survey numbers it must also be held to be illegal because it was effected without notice to the interested parties and the error was not due to fraud, collusion or oversight or other cause of a like nature.

On the strength of the aforesaid findings the District Judge reversed the decree of the Subordinate Judge and passed a decree in the following terms :—

I declare that the plaintiffs are the registered occupants of the plaint survey numbers entitled to hold them in perpetuity, subject to the payment to the defendant of the amounts due on account of land revenue for the same and subject to the other conditions specified in section 68, Land Revenue Code, and I direct that an injunction do issue restraining the defendant from obstructing the plaintiff's enjoyment of the said lands.

While the appeal in the District Court was pending the original defendant, Lakshman Narayan Bhagavat, died and his two legal representatives were brought on the record and they preferred a second appeal.

Jayakar, with *P. B. Shingne*, for the appellants (defendants).

G. S. Rao (Government Pleader), for the respondents (plaintiffs).

SCOTT, C. J. :—The plaintiffs are tenants of certain rice lands in the alienated village of Ramraj in the Thana District. The

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

suit are concerned, *viz*, survey No. 4 (phalni Nos. 1 and 3), 11 (1), 12 (1 and 2), 418 (3) and 51 (1) there was no application at all made by the defendant to have a mutation of names effected in his favour.

The nature of the inquiry made by the authorities is disclosed on a perusal of exhibits 221, 229, 225, 223. It appears from these exhibits that the Collector forwarded the application of the defendant to the survey authorities for disposal. Those authorities did not give any notice to Shivram or any other registered occupant who were interested; they merely referred to earlier orders Nos. 1460 and 1461 (dated 15th October 1892) in which the Superintendent had directed that all lands, kharif as well as varkas in both villages, should be entered in the inamdar's name, and finding that these orders were untenable on the face of them they fell back on the ledger for the year 1888-89 and directed that there should be a mutation of names of registered occupants in conformity with the entries in that ledger. The effect of this order was that the elaborate inquiries made by the survey officers as a preliminary to the introduction of survey on 9th July 1894 were superseded and the *status quo ante* restored by a stroke of the Superintendent's pen.

It was obvious that this procedure would result in grave irregularities; the defendant himself pointed out to the Mamlatdar that certain kharif land to which he had no title was wrongly entered in his name (*vide* his application, exhibit 221, dated 2nd March 1896). I have above shown that several plots of *pot varkas* lands to which defendant had no claim were also entered in his name. We have now to see what is the legal effect of a mutation of names effected in the manner above summarized.

This question must be answered by a reference to the terms of section 109, Land Revenue Code, which is the only section empowering corrections to be made in the settlement register. We are here concerned with clause 2, the requisites of which seem to be (1) an application for correction to be made to the survey officer or revenue officer, (2) an inquiry by the officer who receives the application, (3) proof that the error has been made through fraud, collusion or otherwise.

There can be no ambiguity as to the first requisite above enumerated.

Turning to the second requisite, it seems to me that the inquiry to be held should be of a judicial or a quasi-judicial character, because the concluding portion of the clause "notwithstanding that all parties interested do not admit the error" contemplates that an opportunity should be given to the parties interested to show cause against the application.

Mr. Shingne contends that the section should be construed in the light of the provisions of sections 193—197, Land Revenue Code, and that the inquiry contemplated being neither a "formal" nor a "summary" inquiry within the meaning of those sections need not necessarily be of a judicial or quasi-judicial character. He further refers to the analogous provisions of section 21 of the Registration Act (III of 1877), and argues that when the legislature has conferred a discretion on certain affairs, it is not for the Courts to question the exercise of that discretion by those officers. In support of this contention, he cites I. L. R. 21 Bom

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

60, 609 and 6 All. 460. This argument involves an obvious confusion between the conditions precedent to the exercise of discretion on the one hand and the mode in which the discretion is exercised on the other. It is always the duty of the Courts to determine whether the conditions prescribed by the legislature before discretion can be lawfully exercised have accrued though the Courts will generally be loth to interfere with the exercise of discretion in a particular manner.

As to the third requisite I am of opinion that the phrase "or otherwise" should be construed so as to apply to causes *ejusdem generis* with the preceding causes and that a correction can be made under section 109, Land Revenue Code, only when an error has been made through fraud, collusion, oversight or other causes of a like nature. To hold otherwise would be to clothe the Assistant or Deputy Collector with a general power of revision over the results of the survey operations which would entirely defeat the scheme of the Land Revenue Code.

If this is the correct interpretation of section 109, Land-Revenue Code, it is obvious that the mutation of names with regard to survey No. 4 (1 and 3), 11 (1), 12 (1 and 2), 48 (3), 51 (1) was *ultra vires*, because there was no application for correction with regard to them, while with regard to the remaining survey numbers it must also be held to be illegal because it was effected without notice to the interested parties and the error was not due to fraud, collusion or oversight or other cause of a like nature.

On the strength of the aforesaid findings the District Judge reversed the decree of the Subordinate Judge and passed a decree in the following terms :—

I declare that the plaintiffs are the registered occupants of the plaint survey numbers entitled to hold them in perpetuity, subject to the payment to the defendant of the amounts due on account of land revenue for the same and subject to the other conditions specified in section 68, Land Revenue Code, and I direct that an injunction do issue restraining the defendant from obstructing the plaintiff's enjoyment of the said lands.

While the appeal in the District Court was pending the original defendant, Lakshman Narayan Bhagavat, died and his two legal representatives were brought on the record and they preferred a second appeal.

Jayakar, with *P. B. Shingne*, for the appellants (defendants).

G. S. Rao (Government Pleader), for the respondents (plaintiffs).

SCOTT, C. J. :—The plaintiffs are tenants of certain rice lands in the alienated village of Ramraj in the Thana District. The

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

defendant is the inamdar of the village, being owner of a share of 14 annas and 6 pies and mortgagee of the remaining interest.

The plaintiffs sue for a declaration of their title to the *varkas* lands described in the plaint and to restrain the defendant from obstructing their enjoyment thereof and for restoration of possession if it be held that possession was with the defendant at the date of suit In the first Court the plaintiff's suit was dismissed but in the lower appellate Court the District Judge, though agreeing with the lower Court upon the questions originally raised, held that by reason of certain proceedings of the revenue authorities taken on the introduction of the survey settlement to the village of Ramraj, the plaintiffs were occupants of the lands they claimed and entitled to hold them in perpetuity subject to payment of assessment to the defendant-inamdar.

The rights of tenants of rice lands over adjoining waste land of their superior holder is, by custom in the Thana District, confined to the use of portions of the waste for obtaining the manure without which the rice lands could not be cultivated or the assessment on the rice land earned and paid. Upon the evidence the Subordinate Judge held, and the learned District Judge agreed, that the presumption that the user by the rice lands' tenants of the *varkas* land was with the leave and permission of the inamdar unrebutted, that no permanent tenancy was proved and that the claim to hold the *varkas* lands as part and parcel of the rice lands was excluded by the pleadings and could not be sustained.

The learned District Judge in reversing the decree of the lower Court reasoned as follows :—

The survey settlement was declared in the village on the 9th of July 1894. In the register of occupants under that settlement the defendants were entered as occupants of the *varkas* lands in dispute. Section 217 of the Land Revenue Code provides that when a survey settlement has been introduced into an alienated village, the holders of all lands to which such settlement extends shall have the same rights as

occupants in unalienated villages under the provisions of the Act. Therefore, the plaintiffs are entitled to all the rights of occupants of the lands in suit.

It is true that the entry of the plaintiffs' names was contrary to an order of the revenue authorities passed on the 15th of October 1892 after hearing the plaintiffs and the inamdar, it is true that on the 9th of July 1894 the very day of the introduction of the survey settlement the inamdar protested against the mistake which had been made, it is true that after inquiry the revenue authorities rectified the register by entering against the lands in suit the name of the inamdar; but the learned Judge answers that the order of the 15th of October 1892 was untenable on the face of it and that the inquiry held by the revenue authorities was *ultra vires* and their rectification of the register unauthorised

In considering whether the plaintiffs can claim the benefit of section 217 of the Land Revenue Code it is necessary to consider whether they were 'holders' of the lands in suit at the date of the introduction of the survey settlement.

Now 'holder' under the Code is defined by section 3 (11) as signifying the person in whom a right to hold land is vested. We have only to turn to the finding of the Subordinate Judge, which was concurred in by the District Judge, to convince ourselves that the plaintiffs were not 'holders' of the lands in suit; their claim as occupants cannot therefore be supported by section 217 of the Code. It is the only ground upon which the decree was passed in their favour. The defendants' appeal must therefore succeed.

We think it desirable however to examine the reasons of the learned Judge for holding that the rectification of the register was unauthorised.

It is to be observed that he gives no reasons for stating that the order of the 15th of October 1892 was untenable As regards the inquiry instituted by the revenue authorities on the defendants' complaint, it was a departmental inquiry for the purpose of ascertaining why the order of the 15th of

1911.

WASUDEV LAKSHMAN v. GOVIND MAHADEV.

defendant is the inamdar of the village, being owner of a share of 14 annas and 6 pies and mortgagee of the remaining interest.

The plaintiffs sue for a declaration of their title to the *varkas* lands described in the plaint and to restrain the defendant from obstructing their enjoyment thereof and for restoration of possession if it be held that possession was with the defendant at the date of suit In the first Court the plaintiff's suit was dismissed but in the lower appellate Court the District Judge, though agreeing with the lower Court upon the questions originally raised, held that by reason of certain proceedings of the revenue authorities taken on the introduction of the survey settlement to the village of Ramraj, the plaintiffs were occupants of the lands they claimed and entitled to hold them in perpetuity subject to payment of assessment to the defendant-inamdar

The rights of tenants of rice lands over adjoining waste land of their superior holder is, by custom in the Thana District, confined to the use of portions of the waste for obtaining the manure without which the rice lands could not be cultivated or the assessment on the rice land earned and paid. Upon the evidence the Subordinate Judge held, and the learned District Judge agreed, that the presumption that the user by the rice lands' tenants of the *varkas* land was with the leave and permission of the inamdar unrebutted, that no permanent tenancy was proved and that the claim to hold the *varkas* lands as part and parcel of the rice lands was excluded by the pleadings and could not be sustained.

The learned District Judge in reversing the decree of the lower Court reasoned as follows :—

The survey settlement was declared in the village on the 9th of July 1891. In the register of occupants under that settlement the defendants were entered as occupants of the *varkas* lands in dispute. Section 217 of the Land Revenue Code provides that when a survey settlement has been introduced into an alienated village, the holders of all lands to which such settlement extends shall have the same rights as

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

MALKAJEPPA BIN MADIVALAPPA BULLA (ORIGINAL PLAINTIFF), APPELLANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.* 1911. November 1

Limitation Act (XV of 1877), Schedule II, Article 14—Order—Suit to set aside order—Collector—Order ultra vires*—Land Revenue Code (Bombay Act V of 1879), section 37.*

Article 14 of the Second Schedule of the Indian Limitation Act only applies to orders passed by a Government officer "in his official capacity." The article does not apply to orders which are *ultra vires* of the officer passing them.

When a Collector passes an order, under the provisions of section 37 of the Land Revenue Code (Bombay Act V of 1879), with reference to land which is *primâ facie* the property of an individual who has been in peaceful possession thereof and not of the Government, he is not dealing with that land in his official capacity, but is acting *ultra vires.*

APPEAL from the decision of T D. Fry, District Judge of Dharwar

The facts are fully stated in the judgment.

Coyaji, with *G S. Mulgaokar*, for the appellant.

G. S. Rao, Government Pleader, for the respondent.

RUSSELL, J.—The plaintiff herein sued to be declared owner of a piece of ground in Mouje Gadag measuring eight feet long from north to south and thirty-three feet broad from east to west, immediately to the south of the present building of the plaintiff and also for an injunction to restrain the defendant, the Secretary of State, from interfering with the plaintiff's enjoyment of the ground or extending his building thereover. Although the plaint does not, in so many words, pray to set aside the Deputy Collector's order hereinafter set out still paragraph 4 which says *inter alia* that "this order is erroneous and illegal. Government had no title whatever to the plot" obviously involves such a consequence. It appears that the plaintiff purchased first a plot of land from the Basel Mission which is marked on the plan (Exhibit 18) measuring as stated in the deed

* First Appeal No. 89 of 1910.

1911.

MALKAJEPPA v. SECRETARY OF STATE FOR INDIA.

(Exhibit 10) fifty-six feet east and west to the north, twenty-nine feet east and west to the south, and fifty-seven feet on the east side and fifty-four feet on the west side, the southern boundary being given as Government Betta land Subsequently, the plaintiff bought another piece of land to the north of the former thirty-five feet east to west and eight feet north to south, and the plaintiff has built upon the said pieces of ground.

The learned Judge in the Court below has found, and we have had no argument addressed to us to the contrary that the plaintiff purchased and is entitled to sixty-two feet from north to south, but that, as a matter of fact, he has up to the present time built over only sixty feet; in other words that he is entitled to build over a space of two feet further to the south than what he has already built over.

On the 27th December 1906, the District Deputy Collector passed the order (Exhibit 24), the effect of which was to restrain the plaintiff from building over the said two feet. It was in the following terms :—

I personally inspected the ground in dispute and also took measurements It is not now in the condition in which it was when it was purchased. The building of that time is removed and the present one is newly built. In the deed of sale under which this ground was purchased, the boundaries of the ground purchased have been mentioned. It is mentioned therein that on the north there is the backyard of Gowda Recently out of that backyard a portion adjoining this ground in dispute was got by Malkajeppa by way of purchase. To the east thereof he now holds what has now come to the share of Dyamangowda. The old wall built on the boundary of the backyard of his share exists now. That wall alone is the index to determine the ground purchased. In the deed of sale, the measurements of four sides have been mentioned. From the corner between the north and the east, (that is) from the north-east corner of the above wall, the measurement north to south from the corner to the east along the whole length of the building is fifty-seven feet. Malkajeppa says that the measurement of the building should be taken in a straight line and that thus the ground upto the point at which it measures fifty-seven feet to the south belongs to him. What he says is not correct. In the deed of sale, it is mentioned that towards the east the measurement of the building including an open ground and trees is fifty-seven feet It is also mentioned that the measurement east to west is fifty-six feet towards the north. These two measurements are found to be correct if they are taken from the abovementioned north-east corner. What Malkajeppa says is wrong. The building now existing and the measurement in the sale-deed tally (a difference of one foot or half a foot is not of any importance Now, after the

dispute arose, the Circle-Inspector took measurements according to scale. They might not have been taken in that manner when they were entered in the deed of sale formerly). From the existing condition it does not appear that the Government land is included in the building now built by Malkajeppa. Therefore it does not appear necessary to take further steps in this matter. But now the building should not be allowed to be extended on the south over a larger space than it occupies at present It should be allowed to remain in its present dimensions. Besides informing Malkajeppa in writing of the above decision, steps should be taken to supply a Dakhla (a copy of it) to the village also.

We have set the order out at length, for it seems to us that it is an order which "interfered with the plaintiff's possession so as to give rise to a cause of action, and not simply an administrative order which needs no setting aside." See per Parsons, J., in *Surannanna* v. *Secretary of State for India*[1]. The plaint was filed on the 11th of August 1908, and the defendant has raised a plea of limitation, under Article 14 of the Limitation Act of 1877 The plaintiff in his plaint says that he unsuccessfully filed before the revenue authorities appeals against the District Deputy Collector But we agree with the learned Judge's opinion that that fact will not affect the question of limitation. See *Abaji* v. *Secretary of State for India*[2]. The learned Judge held, as we have pointed out, that the plaintiff is in fact entitled to the two feet extra to the south of his present building, but that the suit is barred under Article 14 of the Limitation Act

The question we have to decide is Is this view correct? It is admitted that the Deputy Collector in passing the said order purported to act under section 37 of the Land Revenue Code, which runs thus :—

All public roads, lanes and paths, the bridges, ditches, dikes and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below high water-mark and of rivers, streams, nalas, lakes and tanks and all canals and watercourses, and all standing and flowing water, and all lands, wherever situated, which are not the property of individuals, or of aggregates of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force, are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government;

(1) (1904) 21 Bom. 435 at p. 455. (2) (1896) 22 Bom. 579 at p. 582.

1911.

MALKAJEPPA v. SECRETARY OF STATE FOR INDIA.

and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

Explanation.—In this section "high water-mark" means the highest point reached by ordinary spring-tides at any season of the year.

Obviously the important words in that section are "all lands, wherever situated, which are not the property of individuals, etc , and except in so far as any rights of such persons may be established in or over the same."

Section 135 of the Land Revenue Code runs as follows:—

"Any suit instituted in a Civil Court to set aside any order passed by the Collector under section 37 or 129, in respect of any land situated within the site of a village, town or city, shall be dismissed, although limitation has not been set up as a defence, if it has not been instituted within one year from the date of the order"

Article 14 of the Limitation Act of 1877 runs as follows:—"To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for." The words "or order" were not in the Limitation Act of 1871. The important words in that article are "in his official capacity." Judging of this case by the light of this Legislation alone it appears to us that, if a Collector purports to deal with land which is *primâ facie* the property of an individual who has been in peaceful occupation thereof and not of the Government, and passes an order with reference thereto, he is not dealing with that land in his official capacity, but is acting *ultra vires*. If this is so, then the judgment of Jenkins, C. J., in *Surannanna* v. *Secretary of State for India*[1], is directly applicable; so also is *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi*[2] (see especially Trevelyan, J.'s judgment in that case); and *Balvant Ramchandra* v. *Secretary of State*[3]. We have read the three judgments in *Surannanna's case*, but have been quite unable to differentiate this case from

(1) (1904) 24 Bom. 425 at p. 441. (2) (1894) 21 Cal. 626.
(3) (1905) 29 Bom. 480

the judgment of Jenkins, C. J., nearly the whole of whose judgment is applicable to the present case.

1911.

MALKAJEPPA v. SECRETARY OF STATE FOR INDIA.

If we are right in this opinion, it follows that the decree in the lower Court must be reversed and the decree we would pass is :—Declare the plaintiff entitled to the strip of land measuring two feet north and south and thirty-three feet east and west, and grant an injunction restraining the defendant, his servants and agents, from interfering with his possession thereof, dismiss the plaintiff's suit in so far as he claims any relief in respect of the remaining six feet of the said southern strip and direct each party to bear his own costs throughout.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

GANGADAS DAYABHAI (ORIGINAL OPPONENT), APPELLANT, *v.* BAI SURAJ (ORIGINAL APPLICANT), RESPONDENT.*

1911. *November 23.*

Civil Procedure Code (Act XIV of 1882), sections 287 and 293—Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default in payment of price by auction purchaser—Proclamation of re-sale—Errors in the proclamation of re-sale—Application by plaintiff's widow to recover from the defaulting purchaser the deficiency of price in the re-sale—Liability creature of statute relating to procedure—At the re-sale statute not complied with.

One Shivlal brought a suit against Bai Samrath. The suit was dismissed and a decree for defendant's costs, namely Rs. 96-2-10, was passed against the plaintiff. The defendant sold the decree to one Nathu, who, in execution attached Shivlal's house. A proclamation of sale was published and at the auction sale one Gangadas Dayabhai purchased the house for Rs. 1,325 and deposited one-fourth of the purchase money. The purchaser, however, made a default in the payment of the balance in time and the house was again put up to sale. A second proclamation of sale was issued, but the descriptions contained in this proclamation were discrepant and did not tally with those in the previous one. At the re-sale only Rs. 200 were realized. Subsequently Shivlal's widow Bai Suraj having applied to recover from the defaulting purchaser the loss on the re-sale,

Held, that the liability of the defaulting purchaser was the creature of a statute relating to procedure and that statute laid down in very clear terms that

* Second Appeal No. 299 of 1910.

1911.

GANGADAS DAYABHAI v. BAI SURAJ.

v. *Moheep Narain Singh*(1). But the question in this *case* is not whether there is any literal difference between Exhibit 18 and Exhibit 54 but whether the description in the proclamation Exhibit 51, either upon its own internal evidence or upon other external evidence was such as to make intending purchasers think that the subject of the sale was something else than the subject of the first sale, viz., Shivlal's interest in the property.

The opponent preferred a second appeal.

L. A. Shah for the appellant (opponent).

D. A. Khare for the respondent (applicant).

SCOTT, C. J. —This was an application by the applicant under section 293 of the Civil Procedure Code of 1882, to recover from the opponent the deficiency of price on a re-sale of the applicant's interest in a house purchased at the first sale by the opponent.

The lower Court rejected the application on the ground that owing to an error in the proclamation of the re-sale, the property re-sold was not the same as the property sold.

The applicant who was the judgment-debtor appealed.

The learned Judge of the lower appellate Court held that the learned Subordinate Judge had attached excessive importance to a mere clerical error in the re-sale proclamation.

The errors in the proclamation are stated by the Subordinate Judge as follows :—

"The proclamation Exhibit 18 is for the first sale. In the body of the process the property is described as belonging to the plaintiff, that is, to Shivlal Bhagwan. And yet in the title this Shivlal is entered as the defendant. Then in the tabular statement, the property is again mentioned as belonging to the plaintiff. In the second note below this statement, the property is called the plaintiff's. Then comes Exhibit 51 the proclamation relating to the second sale or re-sale. Here Nathu is described as both 'defendant and plaintiff' and Shivlal's widow Suraj is described as the '*defendant*' in the heading. Then in the *body* of the proclamation it is said that the *property* of the 'defendant' is going to be sold; whilst in the tabular statement it is said that the property of the 'plaintiff' is going to be sold. This sale proclamation even taken by itself is absurd. In the body of it, the property is said to be the 'defendant's' whilst in the tabular statement it is said to be the 'plaintiff's' property that is going to be sold. Then again, it is difficult to understand who is the plaintiff and who the defendant. The proclamation is unintelligible and we cannot say whose property has been sold."

Now the property to be sold was the right, title and interest of one Shivlal, who, though the plaintiff in the suit, was judgment-debtor, because a decree had been passed under which he was liable for costs. It may be that the fact that the plaintiff was the judgment-debtor was the cause of the inconsistencies between the two proclamations to which the learned Subordinate Judge has called attention. The fact, however, remains that in Exhibit 18 the property to be sold is the right, title and interest of the plaintiff. And if reference is made to the title of that proclamation, it will be seen that the plaintiff is Samrath. In the second case the property to be sold is the right, title and interest of the defendant and, if the title of the proclamation is referred to, it is seen that the defendant is Shivlal Under these circumstances the learned Subordinate Judge had ground for saying that the property sold was not the same in each case. Should we then accede to the view of the lower appellate Court that excessive importance has been attached to a mere clerical error? It must be remembered that this is an attempt to make the auction purchaser at the first sale liable for a difference in the result of the two sales. That liability is the creature of a statute relating to procedure and that statute lays down in very clear terms that in the proclamation of sale the proclamation shall specify as fairly and accurately as possible the property to be sold. It is admitted that the first proclamation did not state either fairly or accurately the property to be sold, and as it is sought to fix liability upon the present appellant by reason of the words of the statute, we think that he is entitled to appeal to the words of section 287 to show that the statute has not been complied with and that it cannot be said that there was a re-sale of the property which was put up in the first instance.

For these reasons we reverse the decree of the lower appellate Court and dismiss the application with costs throughout upon the applicant.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor.

1911. *August 22.*

R. D. SETHNA (PLAINTIFF), APPELLANT, *v.* THE NATIONAL BANK OF INDIA, LTD., AND ANOTHER, DEFENDANTS AND RESPONDENTS.*

Transfer of shares in company—Two claimants to shares standing in name of third party—Priority of title—When it prevails.

The rule laid down in *Moore* v. *North Western Bank*(1) followed: namely, that, as between two persons claiming title to shares in a company which are registered in the name of a third person, priority of title prevails unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he, the second claimant, has acquired the full *status* of a shareholder or at any rate that all formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company which, as between the company and the second claimant, the company could not have refused to do *forthwith.* So that, as between himself and the company, he may be said to have acquired a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title.

BAI MOOTIBAI, daughter of one Ambaram Motichand, deceased, filed a suit being Suit No 31 of 1909 against the second defendant herein praying for the administration of the property and estate of the said Ambaram Motichand and for an account of his management of the property from the second defendant, who was the sole surviving executor of Ambaram On the 1st day of March 1909 the plaintiff was by an order of the High Court of that date appointed Receiver in Suit No. 31 of 1909 of the estate of Ambaram. After the death of Ambaram the second defendant after he had become sole executor obtained possession of the certificates for twenty shares in the Textile Manufacturing Company and got them transferred to his name on the 13th September 1908. On the 22nd September 1908 the second defendant pledged ten of the twenty shares with the first defendant Bank and on the 16th October 1908 he pledged the other ten shares with the Bank for a total advance of Rs. 16,000 which he fraudulently applied to his own use. The plaintiff filed this suit for a declaration

* Original Suit No. 36 of 1910.

(1) [1891] 2 Ch. 599.

that the twenty shares above mentioned the certificates of which were in the possession of the first defendant formed portion of the estate of Ambaram and that the first defendant might be ordered to deliver the said twenty share certificates to the plaintiff. He further prayed that in the event of it being held that the first defendant Bank had a good title to the said share certificates as against the plaintiff as security for moneys advanced to the second defendant, that an account might be taken of the amount due in respect of such advances and that the plaintiff might be allowed to redeem the said twenty share certificates on payment of the amount found due to the first defendant and that the first defendant might be ordered to deliver the said twenty share certificates to the plaintiff on payment by the plaintiff of the amount found due to the first defendant.

The first defendant Bank submitted that they had had previous dealings with the second defendant, all of which had been of a satisfactory character and that they had no reason whatever for supposing that the said twenty shares did not belong to the second defendant absolutely. The Bank took the share certificates as security for the loans *bonâ fide* and without notice that any other person or persons whomsoever had any interest to the said shares, and they submitted therefore that the second defendant was entitled as between himself and the first defendant to deal with the shares and make a valid pledge thereof, that the pledge to them was a valid pledge and that they were under the circumstances *bonâ fide* pawnees for value and as such entitled to hold the shares as security for the said loans They further submitted that in the event of the Court being of opinion that they had not acquired the legal title in the said shares, they were in equity entitled to retain the same until payment and that the plaintiff was in any event only entitled to the said shares on payment to them of such sum as might be secured thereon.

The case was heard before Davar, J., who passed a decree for the plaintiff declaring that the twenty shares above mentioned formed a portion of the estate of Ambaram Motichand and

1911.

R. D. SETHNA
v.
NATIONAL
BANK OF
INDIA.

that the plaintiff was entitled to redeem the shares by paying to the first defendant Rs 16,000 and interest due on the two loans of Rs. 8,000 each from the date of their respective advances. If the shares were not redeemed within a month the first defendant was to be entitled to apply for a transfer of the shares to themselves or their nominee and take all reasonable steps to realise their security.

Against this decree the plaintiff appealed.

Jinnah and *Desai*, for the appellant

Jardine (*Strangman*, Advocate General, with him), for the respondent.

SCOTT, C. J .—*The plaintiff is the Receiver appointed in Suit* No. 31 of 1909 for the administration of the estate of Ambaram Motichand who died in 1900 The second defendant is the surviving executor of the will of Ambaram. The first defendant, a Bank, is the holder of certificates and transferee of twenty shares in the Textile Manufacturing Company deposited with them as security by the second defendant.

The undisputed facts are that after the death of his co-executor in 1905 the second defendant obtained possession of the certificates for the shares above mentioned from the Bank of Bombay in which they were lodged and got them transferred in the books of the Textile Company into his own name from the name of the deceased Ambaram On the 22nd of September 1908 he pledged ten of the twenty shares with the defendant Bank, and on the 16th of October 1908 he pledged the other ten shares with the Bank. Upon the security of these pledges he received Rs. 16,000 which he fraudulently applied for his own use. In the case of each pledge the certificates were accompanied by a transfer deed signed by the second defendant in blank.

On the 1st of March 1909, the plaintiff was appointed interim Receiver of the estate of Ambaram and the defendant was restrained by injunction from dealing with the estate in any way. On the 25th of March the defendant Bank sent in to the directors of the Textile Company a letter signed by

the second defendant intimating that the second defendant was desirous of selling and Mr. Hegarty, one of the officials of the Bank, had offered to purchase the shares and the defendant Bank asked the directors of the Textile Company to transfer the shares accordingly. Before this, however, the directors of the company had received notice from the Receiver not to transfer the shares and the company accordingly declined to accede to the request of the Bank

The Articles of Association of the Textile Company have been put in evidence at the desire of this Court From them it appears that the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register books of the company and no transfer shall be registered unless the directors approve of this transferee The directors may decline to register any transfer of shares if they do not approve of the proposed transferee and the company is at liberty to regard and attend to any notice of any equitable right, title or interest and to give effect thereto if the directors think fit

In this state of facts the case is not distinguishable from that of *Moore* v. *North Western Bank*[1]. Romer, J., said · "As between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title prevails, unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he, the second claimant, has acquired the full *status* of a shareholder; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and the company he may be said to have acquired, in the words of Lord Selborne, 'a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title.'

(1) [1891] 2 Ch. 599.

1911.

R. D. SETHNA v. NATIONAL BANK OF INDIA.

For that proposition the cases of *Societe Generale de Paris* v. *Walker*[1] and *Roots* v. *Williamson*[2] are sufficient authorities, and I need not refer to the cases cited by the defendants in argument, which were decided previously to *Societe Generale de Paris* v. *Walker*[1]"......

"Having regard to these articles, it appears to me to be clear that a transferee of shares in the company, even under a transfer right on every point of form, cannot say as against the company that he becomes a shareholder immediately on the execution of the transfer, or that the company immediately on the sending in the transfer had only to perform a ministerial act. Under these articles the directors clearly have a right to consider who the proposed transferee is, and have time given to them within which to approve of that person as transferee, and if they do not choose to approve within fourteen days of the proposed transferee as a proper person to be registered as a shareholder may decline so to register him, and the transferee will not be a shareholder, nor has he the right to compel the company to make him a shareholder....Before there was any approval by the board of the transfer, or, indeed, any consideration by the board of the transfer at all, the company... received notice of the plaintiffs' claim Having received that notice they properly, in my judgment, refused further to proceed with the transfer until the plaintiffs in this case obtained the direction of the Court in the action which they at once instituted. The Court had seisin of the matter before anything was done, so far as the company was concerned "......

"Under these circumstances, it appears to me to be clear that the North Western Bank were not so invested with the full rights of shareholders before the Steamship Company had notice of the plaintiffs' claim, and have not (again to use the words of Lord Selborne), acquired as against the company 'a present, absolute, unconditional right to have the transfer registered.' The company acted rightly in the matter in not proceeding with the consideration of the transfers sent in to

(1) *Societe Generale de Paris* v. *Walker* (1885) 11 App. Cas. 20 at p. 29.
(2) (1888) 38 Ch. D. 485

them after the action was commenced and the motion made to obtain the direction of the Court as to the rights of the parties."

These observations *mutatis mutandis* are directly applicable to the case now before us The result is that the plaintiff is entitled to the shares. We reverse the decree of the lower Court and pass a decree for the plaintiff in terms of paragraphs 1 and 2 of the prayer of the plaint.

Attorneys for the plaintiff: *Messrs. Tyabji, Dayabhai & Co.*

Attorneys for the defendants *Messrs. Little & Co.*

Decree reversed.

B. N. L.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Chandavarkar, Mr. Justice Batchelor and Mr Justice Heaton.

1911. November 15.

TUKARAM BIN YEDU SAVANT AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 4), APPELLANTS, v. NARAYAN RAMCHANDRA BHAGVAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Deceased Hindu maiden—Stridhan—Competing heirs—Father's sister—Father's male gotraja sapindas *five or six degrees removed—Preference to father's sister.*

In the case of a deceased Hindu maiden leaving surviving her her father's sister and her father's male *gotraja sapindas* five or six degrees removed, her *stridhan* goes to her father's sister in preference to his said male *gotraja sapindas.*

SECOND appeal from the decision of V. M. Ferrers, Assistant Judge of Satara, confirming the decree of R B. Gogte, Subordinate Judge of Karad

The plaintiff sued to recover from the defendants Rs. 150 on account of three years' rent of certain land, alleging that the land originally belonged to one Nana Joti and that after Nana's death it descended to his only daughter and heir

* Second Appeal No. 591 of 1910.

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

Chandra, a minor, that Chandra having died unmarried, Nana's sister Santai became heir and owner, that the plaintiff purchased the land and the right to recover rent from Santai under a registered sale-deed, dated 23rd July 1906, that the land was let to defendant 1 by the guardian of the minor Chandra under a registered rent-note, dated the 16th August 1905, and that defendants 2 to 8 were in possession along with defendant 1.

The defendants contended *inter alia* that the plaintiff's sale-deed was hollow and not executed by Santai and that after Chandra's death the defendants became her heirs.

The Subordinate Judge found that the plaintiff's sale-deed was proved to have been executed by Santai for Rs. 800, that Santai was Chandra's heir, that defendants 2 to 8 were not bound by the rent-note executed by defendant 1 to Chandra's guardian, that the plaintiff was entitled to recover Rs. 150 from the defendants and that Santai had authority to pass the sale-deed to the plaintiff. The Subordinate Judge, therefore, passed a decree for plaintiff awarding him Rs 150 for damages and costs from the defendants.

On appeal by defendants 1 and 4, the Assistant Judge confirmed the decree

Defendants 1 and 4 preferred a second appeal.

The second appeal was heard by Scott, C. J., and Batchelor, J., who having referred the question involved in the case for the decision of a *Full Bench*, the point was argued before a Full Bench composed of Scott, C. J., Chandavarkar, Batchelor and Heaton, JJ.

M. V. Bhat for the appellants (defendants 1 and 4) :—The Subordinate Judge started correctly by holding that the maiden *daughter* Chandra took an absolute estate from her father by inheritance and thus became a fresh stock of descent and that her heirs were entitled to the inheritance. But he was wrong in holding that Chandra's father's sister Santai was a *gotraja sapinda* and as such entitled to her property. [illegible] a paternal aunt is a

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

bandhu: *Mohandas* v. *Krishnabai*[1], *Saguna* v. *Sadashiv*[2], *Ganesh* v. *Waghu*[3]. The defendants are *gotraja sapindas* and a *bandhu* can never come in so long as a *gotraja sapinda* is in existence. The ruling in *Janglubai* v. *Jetha Appaji*[4] is distinguishable. There the competition was between *pitribandhu* and *matribandhu* of a deceased maiden. One was the maiden's father's mother's sister and the other was the maternal grandmother of the maiden

The following texts were cited and discussed —Baudhayana, placitum 30 of section 11, placita 26, 27—30; Manu, Chap. IX, placitum 187, *anantarah sapindadyah* (अनंतरः सपिंडाद्याः) etc., " the nearest *sapinda* male or female takes the inheritance of the deceased owner", Mitakshara, Chap. II, *section* 11, placita 8—31, Stoke's Hindu Law Books, pp 460—465, the expression *tatpratyasannah* (तत्प्रत्यासन्नाः) in placitum 11; Mayukha, Chap. IV, placitum 23, section 10, Stoke's Hindu Law Books, p 105; Manu, Chap. IV, verse 187, "to the nearest *sapinda* male or female the inheritance next belongs."

Gojabai v. *Shrimant Shahajirao Maloji Raje Bhosle*[5], *Manilal Rewadat* v *Bai Rewa*[6]

Jayakar, with *J. R Gharpure*, for the respondent (plaintiff) :—The decision of the lower Court is correct. According to the decisions of the Court a maiden daughter takes an absolute estate and claims to her property have been recently settled by the ruling in *Janglubai* v. *Jetha Appaji*[4]. From the scheme of the Mitakshara and the Mayukha it is quite clear that the authors, after mentioning the kinds of *stridhan*, *indicate the general line of heirs to a married woman's estate.* It refers to two kinds, namely, (1) when the marriage is of an approved form and (2) when it is not of an approved form and lastly follows the provision of law as regards the estate of a female who dies unmarried. Yajnyavalkya uses the word *kania* (कन्या) which means a maiden, a virgin.

(1) (1881) 5 Bom. 597.
(2) (1902) 26 Bom. 710.
(3) (1903) 27 Bom. 610
(4) (1908) 32 Bom. 409.
(5) (1892) 17 Bom 114
(6) (1892) 17 Bom. 758.

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

Chandra, a minor, that Chandra having died unmarried, Nana's sister Santai became heir and owner, that the plaintiff purchased the land and the right to recover rent from Santai under a registered sale-deed, dated 23rd July 1906, that the land was let to defendant 1 by the guardian of the minor Chandra under a registered rent-note, dated the 16th August 1905, and that defendants 2 to 8 were in possession along with defendant 1.

The defendants contended *inter alia* that the plaintiff's sale-deed was hollow and not executed by Santai and that after Chandra's death the defendants became her heirs.

The Subordinate Judge found that the plaintiff's sale-deed was proved to have been executed by Santai for Rs. 800, that Santai was Chandra's heir, that defendants 2 to 8 were not bound by the rent-note executed by defendant 1 to Chandra's guardian, that the plaintiff was entitled to recover Rs. 150 from the defendants and that Santai had authority to pass the sale-deed to the plaintiff. The Subordinate Judge, therefore, passed a decree for plaintiff awarding him Rs. 150 for damages and costs from the defendants.

On appeal by defendants 1 and 4, the Assistant Judge confirmed the decree.

Defendants 1 and 4 preferred a second appeal.

The second appeal was heard by Scott, C. J., and Batchelor, J., who having referred the question involved in the case for the decision of a Full Bench, the point was argued before a Full Bench composed of Scott, C. J., Chandavarkar, Batchelor and Heaton, JJ.

M. V. Bhat for the appellants (defendants 1 and 4):—The Subordinate Judge started correctly by holding that the maiden daughter Chandra took an absolute estate from her father by inheritance and thus became a fresh stock of descent and that her heirs were entitled to the inheritance. But he was wrong in holding that Chandra's father's sister Santai was a *gotraja sapinda* and as such entitled to her property. According to the rulings of this Court a paternal aunt is a

was held there that, in default of either brother, mother or father, the heir to her *stridhan* was her father's nearest *sapinda*. That rule of law was held in that case to rest on the ground that a Hindu maiden, dying without leaving brother, mother or father, as heir, must be treated, for the purposes of succession to her *stridhan*, as a woman married according to one of the unapproved rites, and dying childless.

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

In the case of such a woman, the law, according to the Mitakshara, is that her *stridhan* shall go, in default of her father, to *his* nearest *sapinda* (*tatpratyasannáh*). Both according to the law under the Mitakshara and the Mayukha, as established by a series of decisions of this Court, of which the leading authorities are *Sakharam Sadashiv Adhikari* v. *Sitabai*[1], *Dhondu Gurav* v. *Gangabai*[2], *Kesserbai* v *Valab Raoji*[3] and *Bhagwan* v *Warubai*[4], the father's sister would become entitled to the *stridhan* of the deceased maiden as his nearer heir. As was pointed out in one of the cases just cited, the law in this Presidency as to the sister of a propositus rests, not solely upon either the Mitakshara or the Mayukha, but conjointly upon both

But it is contended that the rule of the Mitakshara, which states in terms that the father's nearest *sapinda* shall inherit in such a case, has been interpreted by the Mayukha otherwise, as meaning, that is, not the father's *sapinda*, but the woman's *sapinda* through her father; that, according to that interpretation, the father's sister is not a *sapinda* but is a *bandhu* of the woman herself; and that the appellants, who are his *gotraja sapindas*, become her heirs, because they are also her own *sapindas*.

This interpretation, it is further urged, has the merit of harmonising the Mitakshara and the Mayukha with each other, and in support of it the observations of Telang, J., in *Gojabai's* case[5] and in *Manilal Rewadat* v. *Bai Rewa*[6] are relied upon by the learned pleader for the appellant.

(1) (1879) 3 Bom. 353.
(2) (1879) 3 Bom. 369.
(3) (1879) 4 Bom. 188.
(4) (1908) 32 Bom. 300.
(5) (1892) 17 Bom. 114 at p 118.
(6) (1892) 17 Bom. 758 at pp. 763 and 764.

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

As to *Gojabai's* case, Telang, J., expresses no final opinion on the meaning of the Mayukha's interpretation of the Mitakshara rule. He points out, however, that "it is possible to harmonise them, if both the Mitakshara and the Mayukha are understood to refer to the same heirs, only by different descriptions—the Mitakshara describing them as the *sapindas* of the husband, the Mayukha as *sapindas* of the wife in the family of the husband" Telang, J, has not gone on to consider how both mean the same heirs.

In the other case cited, *Manilal Rewadat* v. *Bai Rewa*[1], Telang, J, was combating the view expressed by Mr. Mayne, in his Hindu Law and Usage, that, according to the Mayukha, *where a woman dies, leaving stridhan which is not of the* technical kind, being her *inherited property, that property* must be treated as reverting, on her death, to the male from whom it was inherited by her, and that it must, therefore, go to his heirs after her. Telang, J, points out that there is no warrant in the Mayukha for this view and that Nilakantha discards it in the passage in Chap IV, section 10, placitum 28. There, observes that learned Judge, (pp 763, 764) "in dealing with the devolution of *stridhan* in default of the husband, Nilakantha states the view of the Mitakshara, which *might be* supposed to be that it goes to the husband's relations *as such, and then proceeds to point out that such a supposition would be* incorrect, and finally lays it down that the Mitakshara must be construed in a sense identical with his own opinion, which is that the heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family." From this it is clear that, in the opinion of Telang, J, Nilakantha thought that the Mitakshara might be *supposed* to be at variance with his doctrine, and that his explanation was intended to *show* that the *supposition* was *incorrect—that, in other words, he* meant the same heirs whom the Mitakshara had in view. Telang, J., did not address himself to the further question which arises on the Mayukha's explanation of the Mitakshara rule, whom does Nilakantha mean as the heirs of the woman

(1) (1892) 17 Bom 758 at pp. 763 and 764

through her husband in his family? A consideration of that question was not necessary for the purpose of combating the view of Mr Mayne Mr. Mayne said that the *stridhan* reverted to the last male owner as the propositus according to the Mayukha, and that his heirs took the woman's non-technical *stridhan*, not the woman's own heirs. Telang, J., answered that Nilakantha's doctrine was that the woman was the proposita because her heirs in her husband's family took the *stridhan*. Now, a deceased woman does not cease to be the proposita merely because her *sapindas* are the same without distinction as the *sapindas* of her husband or of her father, according to the Shastras. According to Mr. Mayne's view, the woman disappears altogether According to Telang, J, she remains as the proposita. The fact that she so remains is not inconsistent with the fact of her *sapinda* being the same as her husband's or her father's. For instance, in the case of a male, his father's *bandhus* come in as his heirs in default of his own *bandhus* That does not mean that the male in question ceases to be the propositus. All it means is that his father's *bandhus* become his heirs as his own *bandhus*.

A careful and close examination of the language of the Mitakshara and of the Mayukha on the subject now under discussion becomes necessary for the purpose of the question arising in this case.

First, as to the Mitakshara. The passage is in placitum 11 of Chap. II, section 11, Stoke's Hindu Law (p. 460) :—

" Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the (whole) property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (*sapindas*) allied by funeral oblations But in the other forms of marriage called Asura, Gandharba, Rakshasa and Paicacha; the property of a childless woman goes to her parents, that is, to her father and mother.' The succession devolves first (and the reason has been before explained), on the mother, who is

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

virtually exhibited (first) in the elliptical phrase '*pitrigami*,' implying 'goes (*gachhati*) to both parents (*pitarau*); that is, to the mother and to the father.' On failure of them, their next of kin take the succession."

The original for "to his nearest kinsmen" in the above quoted passage is *tatpratyasannanam sapindanam*, which translated literally is. "Of the nearest *sapindas* thereof." The original for the words "their next of kin" in the last sentence of the same passage is "*tatpratyasannanam*" ("of the nearest thereof").

It is contended by Mr Bhat, the learned pleader for the appellant, that the words "*tatpratyasannáh*" in either case mean *her* nearest "kinsmen," that is, of the woman, who is the proposita (the *kutastha*, to use the word familiar to the commentators), not, as in the translation, "his," meaning, the husband's or the father's The nearest antecedent to the pronoun *tat* is the husband or the father; and the rule of grammar in Sanskrit requires that the pronoun should be referred to that antecedent

That is how the Vira Mitrodaya understands the Mitakshara rule (G. Sarkar's Translation, p 240). Where the word *tat* is intended by the context to refer not to the nearest but a remoter antecedent, the commentators are as a rule careful to point that out, as, for instance, where the Vira Mitrodaya says so in another connection at p. 243 of Mr. Sarkar's Translation (paragraph 14). Balambhatta also interprets the Mitakshara rule now under discussion in his commentary on the Mitakshara in the same way as the Vira Mitrodaya. He says:—"In the case of *asura* and the like forms of marriage, it becomes paternal. This expression 'becomes paternal' is used as (being) elliptical for the text: 'In default of her issue, it is desired by her mother and father.' In default thereof, that is, in default of both of them in the order stated, it goes to the nearest kinsmen of both. That is the meaning."

Balambhatta reasons as follows:—Yajnyavalkya's text, on the subject of inheritance to the *stridhan* of a woman dying childless, merely says that it goes to her husband, *if she* was

married in one of the approved forms, but that it goes to her father, if her marriage was in one of the unapproved forms. The Mitakshara adds to that, that in default of the husband in the one case, and in default of the father in the other, it goes to the husband's "nearest *sapinda*" in the former and the father's "nearest *sapinda*" in the latter. Yajnyavalkya does not mention either the husband's or the father's *sapindas.* How does the Mitakshara get them? What is the Mitakshara's authority for adding to Yajnyavalkya's text what is not specified in it? Balambhatta answers that the Mitakshara's authority is the well-known canon of construction that a text should be interpreted, not literally, but by the light of the implied meaning which it has received from usage or popular understanding The canon is. *patha kramat artha kramo baliyan.* This canon is called by Balambhatta the rule of *Ubhaya Shesha,* according to which the use of a word includes and incorporates something besides what it literally imports, that something being understood. So "husband", explains Balambhatta, means "husband and his nearest *sapinda*"; "father" means "father and his nearest *sapinda*".

The Mayukha deals with the same question as follows: Where the woman was married according to the approved form, and she dies childless, her *stridhan* goes to her husband; if she was married according to one of the unapproved forms, it goes to her father. In default of the husband in the former case, it goes to the person who is *her* nearest *sapinda* "through him"; in default of the father, in the latter case, it goes to the person who is her nearest *sapinda* "through" the father. And these two propositions are laid down in the Mayukha on the authority of the well-known rule of Manu, which is invoked wherever no express rule of inheritance is laid down in the Smritis: "The wealth of the deceased shall belong to his nearest *sapinda*."

This statement of the rule by the Mayukha that, in default of the husband, the *stridhan* of the woman shall go to her nearest *sapinda* through him, and that, in the other case, in default of the father, it shall go to her nearest *sapinda* through

1911.

TUKARAM v. NARAYAN RAM-CHANDRA.

virtually exhibited (first) in the elliptical phrase '*pitrigami*,' implying 'goes (*gachhati*) to both parents (*pitarau*); that is, to the mother and to the father.' On failure of them, their next of kin take the succession."

The original for "to his nearest kinsmen" in the above quoted passage is *tatpratyasannanam sapindanam*, which translated literally is: "Of the nearest *sapindas* thereof." The original for the words "their next of kin" in the last sentence of the same passage is: "*tatpratyasannanam*" ("of the nearest thereof").

It is contended by Mr Bhat, the learned pleader for the appellant, that the words "*tatpratyasannáh*" in either case mean *her* nearest "kinsmen," that is, of the woman, who is the proposita (the *kutastha*, to use the word familiar to the commentators), not, as in the translation, "his," meaning, the husband's or the father's. The nearest antecedent to the pronoun *tat* is the husband or the father; and the rule of grammar in Sanskrit requires that the pronoun should be referred to that antecedent.

That is how the Vira Mitrodaya understands the Mitakshara rule (G. Sarkar's Translation, p 240). Where the word *tat* is intended by the context to refer not to the nearest but a remoter antecedent, the commentators are as a rule careful to point that out, as, for instance, where the Vira Mitrodaya says so in another connection at p 243 of Mr Sarkar's Translation (paragraph 14). Balambhatta also interprets the Mitakshara rule now under discussion in his commentary on the Mitakshara in the same way as the Vira Mitrodaya He says:—"In the case of *asura* and the like forms of marriage, it becomes paternal. This expression 'becomes paternal' is used as (being) elliptical for the text: 'In default of her issue, it is desired by her mother and father.' In default thereof, that is, in default of both of them in the order stated, it goes to the nearest kinsmen of both. That is the meaning."

Balambhatta reasons as follows:—Yajnyavalkya's text, on the subject of inheritance to the *stridhan* of a woman dying childless, merely says that it goes to her husband, if she was

married in one of the approved forms, but that it goes to her father, if her marriage was in one of the unapproved forms. The Mitakshara adds to that, that in default of the husband in the one case, and in default of the father in the other, it goes to the husband's "nearest *sapinda*" in the former and the father's "nearest *sapinda*" in the latter. Yajnyavalkya does not mention either the husband's or the father's *sapindas*. How does the Mitakshara get them? What is the Mitakshara's authority for adding to Yajnyavalkya's text what is not specified in it? Balambhatta answers that the Mitakshara's authority is the well-known canon of construction that a text should be interpreted, not literally, but by the light of the implied meaning which it has received from usage or popular understanding. The canon is. *patha kramat artha kramo baliyan.* This canon is called by Balambhatta the rule of *Ubhaya Shesha*, according to which the use of a word includes and incorporates something besides what it literally imports, that something being understood. So "husband", explains Balambhatta, means "husband and his nearest *sapinda*"; "father" means "father and his nearest *sapinda*".

The Mayukha deals with the same question as follows: Where the woman was married according to the approved form, and she dies childless, her *stridhan* goes to her husband; if she was married according to one of the unapproved forms, it goes to her father. In default of the husband in the former case, it goes to the person who is *her* nearest *sapinda* "through him"; in default of the father, in the latter case, it goes to the person who is her nearest *sapinda* "through" the father. And these two propositions are laid down in the Mayukha on the authority of the well-known rule of Manu, which is invoked wherever no express rule of inheritance is laid down in the Smritis: "The wealth of the deceased shall belong to his nearest *sapinda*."

This statement of the rule by the Mayukha that, in default of the husband, the *stridhan* of the woman shall go to her nearest *sapinda* through him, and that, in the other case, in default of the father, it shall go to her nearest *sapinda* through

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

him, creates an apparent discrepancy between the Mayukha and the Mitakshara, because the latter speaks of the husband's nearest *sapinda* and of the father's nearest *sapinda*, whereas the Mayukha speaks of the woman's nearest *sapinda through* her husband and her nearest *sapinda* through her father.

The Mayukha goes on to explain that there is no discrepancy.

To understand clearly the Mayukha's treatment of the subject, it is necessary to answer the question which at the outset arises. Why does the Mayukha give an explanation of the Mitakshara rule, if the former had understood the rule as meaning what the latter in terms says, *viz*, that the husband's nearest *sapinda*, and the father's nearest *sapinda* are, according as the marriage is of the approved or of the unapproved form, the same as the woman's own nearest *sapinda* in the husband's family or the woman's own nearest *sapinda* in the father's family

The explanation was called for by the objection or comment to which the Mitakshara had seemingly lent itself. When a Hindu dies and the question arises, who is to inherit his estate, the Hindu Law says that, as a general rule, it shall be inherited by *his sapindas* It is he who is the propositus and the heirship must be determined with reference to *him*. The heirs specifically enumerated in the texts are *his* heirs first; where the specific list is exhausted, Manu's general rule on the subject of inheritance applies, and that rule says that the inheritance shall go to him who is the nearest *sapinda* of the deceased.

Now, the Mitakshara's rule as to succession to a woman, who has died childless, *seems* as if it disregarded the general rule of law above mentioned, because, in the case of such a woman, the Mitakshara says that, if she was married in one of the approved forms and she dies childless and husbandless, her *stridhan* shall go to the *husband's* nearest *sapinda* surviving her, not to *her* nearest *sapinda* surviving; and that if she was married in one of the unapproved forms, and dies childless and fatherless, her *stridhan* shall go to *her father's nearest sapinda* surviving her, not to her nearest *sapinda* surviving.

In other words, the Mitakshara's expression of the rule makes in effect either the husband or the father the propositus, the determining factor of heirship, and thereby seems to depart from the abovementioned principle of Hindu Law. That way of expressing the rule creates an apparent anomaly.

The Mayukha expresses the same rule in another form with a view to remove the seeming anomaly so as to be free from the comment which the Mitakshara's expression might be supposed to invite. What the Mitakshara calls the nearest *sapinda* of the husband of the woman and the nearest *sapinda* of the father of the woman, the Mayukha terms the woman's nearest *sapinda* through her husband in the one case and the woman's nearest *sapinda* through her father, in the other case.

But that gives rise to a question.—Are not the Mitakshara and the Mayukha at variance with each other, then, on this point?

The Mayukha goes on to explain that there is no variance if care is taken to comprehend the meaning of its expression of the same rule, *viz.*, a woman's nearest *sapinda* through her husband or through her father

The Mayukha explains that in order to get such a *sapinda*, we must enter the *kula* or family of the husband or the father, with the husband or the father as the *dwara* or door.

Now, these two words, *kula* or family, and *dwara* or door, used by the Mayukha, are intended to explain that the husband's or the father's *sapindas* are primarily the same as the woman's *sapindas*

First, as to the word *kula*. That word and the word *gotra* are sometimes synonymous There is a distinction in point of *kula* and *gotra* as between a Hindu male and a Hindu female.

In the case of a male he is regarded as an independent personality, with the ancestors of the father reborn and reproduced in him. So again, the son, according to the Shastras, is his own father reproduced by his mother. Hence

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

the mother is called *Jaya*, she who reproduces her own husband in the form of a son[1]. Though by birth he obtains the *kula* or *gotra* of his father, yet the *kula* or *gotra* is *his* without reference to the father's. It is the same with his *kula* or *gotra* as with his interest in ancestral property. That interest he acquires by birth independently of his father. To find out his *kula* or *gotra*, the father is not the guide or door. As Nilakantha says in the Vyavahara Mayukha in the Chapter on Adoption न च पितृत्वं सापिंड्यसमानियतम्: *p. 45*:—"Paternity and Sapindaship are not necessarily co-extensive, so that the absence of the one might lead to the absence of the other" (Mandlik's Hindu Law, p. 63, lines 30 and 31). It is otherwise in the case of a female. The general rule as to a woman is that she has no independence, in whatever state she be, whether married or unmarried. She is dependent on her husband, if married; on her father, if unmarried. Her right to acquire property and to succession has been a much debated question in Hindu Law and was established gradually and by stages as an exception to the general rule as to her complete state of dependence Yajnyavalkya says in verse No. 85 in the section on Rituals that a woman can never be independent—and the Mitakshara accepts that as the rule. She is dependent on the father before marriage, on the husband after it (see p. 23 of the 3rd Edition of Moghe's Publication of the Mitakshara). Answering the question—"What debts of her husband is a woman liable to pay"?—Vijnaneshwara in the Chapter on Debts points out what those debts are and says.—"This does not mean that a woman cannot possess property. All it shows is her dependence." And that, he continues, he will explain more fully in dealing with partition (p. 139). On the subject of partition, he reiterates the view that the *fact of a*

---

(1) पूर्वेषां पित्रादीनां पुत्ररूपेण जन्मउत्पत्तिः

(The ancestors of a man are born again *in the form of a son to him*): The Mitakshara, 3rd Edition, by Moghe, p. 291.

तज्जाया भवति यदस्यां जायते पुनरिति श्रुतिः

(The Mitakshara, Moghe's 3rd Edition, p. 15): "She becomes her husband's generator by whom the husband is reborn"

woman owning wealth is not inconsistent with her dependence (pp. 142 and 143 of Moghe's Edition). In establishing the right of a widow to inherit her husband's property he expresses the same view. In commenting on Yajnyavalkya's text that the King shall not entertain any litigation as between a husband and his wife, Vijnaneshwara points out the exceptions to that rule and says:—"As to women, adjudication (by the King) is allowed in the case of the wives of milkmen, liquor-sellers and the like on account of their independence. From that it is to be understood that in the case of other women of families, there can be no entertaining of disputes, while their husbands are alive, owing to their dependence" (p. 132).

If a woman is dependent, then comes the question—What is her *kula* or *gotra, i. e*, her family? On whom is she dependent for that? This has been a moot question among the *Smriti* writers, and it is discussed by Vijnaneshwara in the section on Rituals (*Achara*) of the Mitakshara. (See p. 76 of the 3rd Edition of the Mitakshara published by Bapu Shastri Moghe.) Vijnaneshwara points out there, that there are two divergent views on the subject—one view is that a married woman's *gotra* is that of her husband; the other that it is the *gotra* of her father Vijnaneshwara reconciles these two views by explaining that the former view applies to a woman who has been married according to one of the approved forms; and that the latter applies to one married according to one of the inferior rites

As to an unmarried woman, her *gotra* is that of her father. See a Smriti of Paithinasi cited by Apararka: पितृगोत्रं कुमारीणाम् (the Anandashrama Series Edition, p. 908).

It follows from this that to ascertain the *kula* or *gotra* of a woman, she must be treated as being dependent upon, subordinate to, and identified with either her husband or father, according as she is married or unmarried. This mode of ascertainment is adopted in her case, not in the case of a male. In his case, he holds his *kula* or *gotra* in his own inherent right. In her case, she has none except with reference to her dependence upon her husband or her father. When a male

1911.

TUKARAM v NARAYAN RAMCHANDRA.

dies, it is nowhere said that to ascertain his heirs we must enter the family of another person with that person as the door. The deceased man is himself the door and the heirs are pointed out by himself. Not so in the case of a woman dying childless .

When, therefore, the Mayukha speaks of a woman's nearest *sapinda* through her husband or through her father as the nearest *sapinda* whom we get as we enter the husband's or the father's *family* (*kula*), with the husband or the father as the door for entrance, the meaning is that for her nearest *sapinda* we must search for the husband's or the father's own *sapinda* She is not the door for entrance; it is her husband or father. He is the way—not she. If we enter with him as the door, we must look out for *his kula*, *i.e.*, his family (*tatkule*), and then ask who are in his *kula* or family, *i.e.*, who are his *sapindas*. They are her *sapindas* also

Then the question is, is the husband's or the father's sister in the *kula* of the husband or the father? The answer must be in the affirmative, because, in bringing in the sister as heir to her deceased brother next after the grandmother and before the other *sapindas*, the Mayukha cites as its authority a text of *Brihaspati*, which says :—

"Where a childless man (leaves) several clansmen, *Sakulyas* (kinsmen) and *Bandhavas* (relations), whoever of them is the nearest takes the wealth (of the deceased)" (Mandlik's Hindu Law, p. 81).

Now, the word *Sakulyas* used in Brihaspati's text is a compound of two words, *samana* (which means "the same") and *kula* (which means "family"). The Mayukha brings the sister in as a *gotraja sapinda*, because she is of the same *kula* or family as her brother. It expressly says that her right is founded on her *gotrajatva*, *i.e.*, the fact of her birth in the *gotra* or family of her brother.

That, again, is not the only place where Nilakantha in the Mayukha establishes the sister as a member of her brother's *kula* for the purposes of inheritance. In the concluding portion

1911.

TUKARAM
v.
NARAYAN
RAM-
CHANDRA.

of his Chapter on Reunion, he cites a text of Madana and a text of Brihaspati which ordain that, under certain specified circumstances, the sister shall take the share of her brother, when he has died as a *reunited* coparcener (The Mayukha: Rao Saheb Mandlik's Edition, p 58 See also *Sakharam Sadashiv Adhikari v Sitabai*[1])

So also the sister is in the *kula* of her brother and is his *gotraja sapinda*, according to the Mitakshara, as interpreted by Nanda Pandita and Balambhatta These latter say that the word "sister" is included in and implied by the word "brothers" in the rule as to obstructed succession. It was on that account mainly that this Court held in the earlier decisions that the sister comes in as heir (*gotraja sapinda*) to her brother immediately after the grandmother, under the Mitakshara.

So much for the word *kula*. Now, it may be urged that a woman's nearest *sapinda* in her husband's or father's family or *kula* need not necessarily mean the husband's or father's nearest *sapinda*. The woman, being the *proposita*, we must, it may be contended, seek for her nearest *sapinda* in the said family; and if that be the case, the sister must go out of the *kula*.

Therefore, to make his explanation more emphatic and free from all ambiguity, Nilakantha further explains that we must seek the nearest *sapinda* of the woman in her husband's or father's *kula* or family by entering that family with the husband or the father as the *dwara*, which means door or way. This word *dwara* conveys here a sense stronger than the English word "through" This is not the only place where Nilakantha uses this metaphorical expression. For instance, he defines *daya* (joint divisible estate) as that species of property "which has come from the father or mother as the *dwara* or door." *Dwara*, therefore, indicates the stock, the source.

This significance of the word as used by Nilakantha is further illustrated by his use of it in his *Shraddha Mayukha*.

(1) (1879) 3 Bom 353 at p. 362.

1911.

TUKARAM
v.
NARAYAN
RAM-
CHANDRA.

inferior forms. Now, it is a canon of construction, according to the Mimamsa (law of interpretation), that where two cases are mentioned together, one of which is the leading and the other subordinate, the same *nyaya* or law must apply to the latter, unless the rule directs otherwise. This canon is called the law of "the loaf and the staff" and is referred to and illustrated in the Mitakshara, placita 6 to 11, Chap I, section 9. Applying this canon to the rule we are discussing, if in the principal case of marriage, the wife's *sapindas* are the same as the husband's without distinction, the same must have been intended as between a daughter and her father also Again, it is another rule of construction in Hindu Law that when the same word is used of two or more objects and in the same connection, it must bear the same meaning as to all of them in the absence of express direction to the contrary[1]. If *dwara* and *kula* mean the identical heirs for husband and wife, they must mean that also for father and daughter.

If it be urged as against this that as between a husband and wife, the texts expressly say that they are one, whereas there is no text which says the same of a daughter with reference to her father, the answer is that in the case of an unmarried woman or of a woman married according to one of the subordinate forms, the theory is that she is dependent upon and merged in the father in virtue of her dependent condition. When the rule we are now discussing says that a woman, married in one of the approved forms, shall have for her *sapindas* her husband's *sapindas* in his family, and that these are to be the same for her as for him, and then the rule says that if the woman were married according to one of the inferior forms, her sapindas through her father in his family shall take her estate, the father is brought in as taking the place which the husband would have taken, if the marriage had been in one of the approved or principal forms. What applies to the husband must apply, therefore, to the father.

(1) The rule is सकृदुच्चरितः शब्दस्समेवार्थमनुघटति

The Mitakshara, 3rd Edition, by Moghe, p. 21.

What I have said so far appears to me to bring about in a reasonable manner harmony between the Mitakshara and the Mayukha on a line of reasoning based upon and supported by the recognized rules of construction and principles in Hindu Law.

In order to adopt the other view urged for the appellant, we must put a forced construction on the plain language of the Mitakshara. We must wrest its words from their clear meaning, and that, not because the grammar or any sensible and well-known rule of interpretation requires it, but because Nilakantha arbitrarily pronounces for it. There, again, we must first construe Nilakantha's language itself as necessarily meaning that the Mitakshara's words must be wrested from their plain sense. Before we so construe Nilakantha's language, we must be clearly satisfied that he does mean what is attributed to him by the argument If any doubt arises, if his explanation is reasonably capable of the construction which I have put, we must yield to that as making sense both of what he says and of what the Mitakshara says and harmonising them without violating grammar and the settled rules of construction and religion in Hindu Law. Further, assuming that the Mayukha's rule is in terms different from that of the Mitakshara, and that Nilakantha understood the latter in a sense not warranted by the grammar of the Mitakshara's words, it is impossible to harmonise the two with each other in a reasonable manner, and where that is not possible, the Mitakshara must prevail: *Krishnaji Vyanktesh* v. *Pandurang*[1].

It may be urged—if Nilakantha meant the *sapindas* of a married woman to be the same as those of the husband or the father according as the marriage was in the approved or unapproved form, why did he not cut short the whole discussion by saying so in a few words instead of conveying his meaning in a somewhat circuitous way likely to be misunderstood and calling for some dissertation to understand him? The answer is very simple. If he had said that, he would

(1) (1875) 12 Bom. H. C. R. 65.

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

have left the matter where the Mitakshara had left it and the question—Why should a woman's husband's or father's *sapinda* and not her own inherit her share?—would have remained unanswered. Nilakantha like all other commentators (Nibandhakars) on Hindu Law takes it for granted that the student of it knows certain well-known principles of the Shastras which govern that law, such as those about *kula* and *gotra* and the status of women; they also assume knowledge on the part of the student of the recognized principles of construction and the meaning and significance of such words as *dwara* and *kula*.

Besides, Nilakantha had to explain away the seeming anomaly of the Mitakshara's expression of the rule and bring it by his explanation into formal and substantial conformity with the general rule to which I have referred above. The objection itself in the form of a question I am noticing may be fairly met by a counter-question. If Nilakantha meant by a woman's *sapindas* through her husband or through her father her *sapindas* as distinct from the husband's or the father's own, why did he not say so? A few words would have sufficed for his purpose in that respect, and the explanation he has given by means of such expressions as "the husband or the father as the door" and "the family of the husband or the father" would have been unnecessary.

The conclusion at which I have arrived is confirmed by one single principle which studiously runs through the scheme of succession to a woman's *stridhan* I have already pointed out that under the Hindu religion and the law flowing from it, a Hindu woman is a dependent being—dependent upon the father before marriage, dependent upon the husband after it. As Hindu society advanced, the rights of a woman also advanced by gradual and successive stages. First, her right to acquire property and hold it as her own wealth was established; her right as heir was also gradually acknowledged. A striking feature of the scheme of succession to her *stridhan* is that her children and grandchildren are recognised as her first heirs. So far she stands on the same level as a male; her newly acquired independence

is preserved. She stands as much as the male as a *proposita* in her own right. She is her own door for her own *kula*. But then comes the parting of ways; when the point as to her issue has been reached, and she dies childless, her dominion and consequently her capacity as a *proposita* become merged. This is expressly stated in a *Smriti* cited by Nilakantha in the Chapter on Partition in the Vyavahara Mayukha: सत्स्वपत्येषु यस्मान्न स्त्रीधनस्य पतिः पतिः p. 33, *i. e.*, "If there be issue, the lord of the wife is not the lord of her wealth" (Mandlik: p 38, line 23, and p. 39, line 1). The law speaks as if it said to the woman: "Thus far you are acknowledged as an independent entity, but if you die childless, you must go back to what is your original position, the state of dependence on either your husband or your father—on your husband, if you were married in the approved form, because according to that form, you were *given away* into his family, on your father, if you were married in the unapproved form, because under that form marriage did not take you out of his family, there being no *giving away* in it. So, if you die childless, you sink into your original position and merge in as being dependent upon your husband or your father for the purposes of succession to your estate."

If we are to seek for warrant in the nature of texts in Hindu Law for this treatment of woman, according as she dies leaving children or dies childless, we have it in the well-known theory that progeny is the sacred purpose of a woman's life. That doctrine will be found referred to in the Mitakshara and in Nilakantha's Samskara Mayukha in more than one place—in the former especially in the section on Rituals, where Vijnaneshwara takes up and explains the Vedic prayer to Indra which women offer at marriage. The prayer is in the words "Let us obtain issue" (प्रजां विदामहे). Vijnaneshwara explains the same doctrine also where, in the same section, he points out that women ought to be maintained, supported, and protected, because they are for the acquisition of progeny and religious merit (धर्मप्रजासंप्राप्तिः प्रयोजनं दारसंग्रहस्य): See Moghe's Publication, 3rd Edition, pp. 20 and 21).

1911.

TUKARAM v. NARAYAN RAMCHANDRA.

The same principle underlies the rule as to succession to a maiden. Her brothers come in first as heirs to her *stridhan*, because she is their *bhagini*—"she who shares with her brothers." In default of brothers, come the parents, the original state of dependence is revived, and she sinks into her parents.

For these reasons, I am of opinion that the lower Courts have rightly held the sister of the father of the maiden in the present case to be heir to the maiden's *stridhan*, in preference to his *gotraja sapindas* five or six degrees removed. The decree under appeal must, therefore, be confirmed with costs.

SCOTT, C. J.:—I agree.

BATCHELOR, J.:—I agree.

HEATON, J.:—I concur.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr Justice Chandavarkar.

1.
er 30.

NATHUBHAI NARANDAS (ORIGINAL OPPONENT No 2), APPELLANT, v. MANORDAS LALDAS AND ANOTHER (ORIGINAL OPPONENT No. 1 AND APPLICANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 96, 100—Land Acquisition Act (I of 1894), sections 53, 54—Land—Compulsory acquisition—Compensation—Award by Assistant Judge—Appeal to the District Judge—Second appeal—Practice and procedure.

Where an award is made by the Assistant Judge under the provisions of the Land Acquisition Act, 1894, and there has been an appeal to the District Judge, no second appeal can lie from the appellate decision.

SECOND appeal from the decision of P. J. Talyarkhan, District Judge of Thana, confirming the awards made by A. W. Varley, Assistant Judge of Thana.

Proceedings under the Land Acquisition Act, 1894.

* Second Appeal No. 916 of 1910.

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

Certain lands were compulsorily acquired by Government, for which the District Deputy Collector of Bassein awarded Rs 2,005-0-5. A dispute having arisen as to the right to receive it between the opponents, Manordas and Nathubhai, he referred the question under section 30 of the Land Acquisition Act, 1894, to the Assistant Judge of Thana. The learned Judge awarded the whole sum to Manordas; and this award was on appeal confirmed by the District Judge.

Nathubhai preferred a second appeal.

At the hearing a preliminary objection was raised that the second appeal did not lie.

G. S. Rao, Government Pleader, for the respondent —I take a preliminary objection. The Land Acquisition Act contemplates only *one* appeal. In this case, an appeal was filed in the District Court and there the right of appealing was exhausted. Hence a second appeal cannot lie. Moreover there is no decree in this case. The proceedings are a kind of award: see *Nilkanth* v *Collector of Thana*[1]; *Laddha Ebrahim & Co.* v. *Assistant Collector, Poona*[2].

P. B. Shingne, for the appellant.—Section 54 of the Land Acquisition Act contemplates an appeal to the High Court and therefore nothing in the Bombay Civil Courts Act can deprive a party of his right of appealing to the High Court. If section 54 is read along with section 118 of Civil Procedure Code, even in a case where a first appeal is preferred to the District Court, an appeal will lie to the High Court and the appeal will have to be considered even on facts. When the lower Court passed a decree in the case, the matter ceased to be an award. Compare the case of *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra*[3]; *Zamindars of Dhar* v. *Rana*[4].

RUSSELL, J. .—This case raises an important and difficult question. Two references Nos. 5 and 7 of 1904, under the Land Acquisition Act I of 1894, were decided by the Assistant Judge of Thana, who in No. 5 ordered that the whole amount of the award, *viz.*, Rs. 2,005-0-5, should be paid to the mort-

(1) (1897) 22 Bom. 802.
(2) (1910) 35 Bom. 146.
(3) (1896) 23 Cal. 526.
(4) [1906] P. R. No. 53 of 1906 (Civ.).

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

gagee Manordas Laldas, each party bearing his own costs, and in No. 7 confirmed the Collector's award, Manordas having objected that the amount awarded by the acquiring officer was too little.

Appeal No. 328 of 1909, of the District File, was decided by the Acting District Judge of Thana who dismissed it with costs.

The above second appeal has been filed in this Court and the preliminary objection is raised by Mr Rao, for the respondent No. 1, that no second appeal lies, and he relies in the first place upon section 54 of the Land Acquisition Act. That provides that:—

Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any *part of the award of the Court in any proceedings under this Act.*

Now section 96 of the Code of Civil Procedure (V of 1908), 1st clause, is as follows.—

Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

The extreme difficulty in this case arises in consequence of two decisions of the Bombay High Court, first, *Nilkanth* v. *Collector of Thana*[1], decided under the former Land Acquisition Act X of 1870, where it was held that that Act did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a *Civil Court to enforce* such a statutory liability, when imposed upon a Collector or other civil officer by means of execution proceedings without a suit. And Farran, C. J., at p. 808, says:—

"In the above view it is unnecessary for me to consider whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings. That is a complex problem which has been set by the Legislature for solution by the Judges. Such problems often arise when the provisions of one Act are introduced by reference into another and incorporated with it."

We may mention in passing that we entirely agree with that remark, and this is the second occasion within a short time on

(1) (1897) 22 Bom. 802.

which we have had to animadvert upon this mode of Legislation.

That case was expressly followed in the case of *Laddha Ebrahim & Co* v. *The Assistant Collector of Poona*[1] where Scott, C. J., says :—"With regard to the first question we think the reasoning of the majority of the Court in *Nilkanth* v. *Collector of Thana*[2] sufficiently establishes that an award under the Land Acquisition Act of 1894 is not a decree or order capable of execution under the Civil Procedure Code and is therefore not within the purview of the section." But in *Zamindars of Dhar* v *Rana*[3], it was decided that an adjudication made by a Court under either sections 26 or 30 of the Land Acquisition Act, 1894, or on appeal under section 54 by the Chief Court as to compensation or apportionment of compensation is tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure and capable of execution, and that a party entitled to any benefit under a decree passed in an appeal under section 54 is entitled to recover the same by process of execution through the Court which passed the original decree or award.

In that case the Punjab Chief Court distinguished *Nilkanth* v. *Collector of Thana*[2] upon the ground that the effect of the provisions of the Act of 1894 on the question before the Court was not decided, and they quote the words which we have above set out from the judgment of Farran, C. J.

We must now refer to section 53 of the Land Acquisition Act which provides that :—

Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act.

The following passage from the judgment of the Punjab Chief Court in *Zamindars of Dhar* v. *Rana*[3] is so important to this present case that we set it out at length :—

"A comparison of the provisions of the previous Act X of 1870, with those of the present Land Acquisition Act, appears to show that proceedings in Court have now

(1) (1910) 35 Bom. 146 at p. 152. (2) (1897) 22 Bom. 802.
(3) [1906] P. R. No. 53 of 1906 at pp 205-06 (Civ.).

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

been almost entirely assimilated to those of an ordinary civil suit. The former Act prescribed a special procedure which had to be followed by the Court, and in the matter of appeal the provisions of the Code of Civil Procedure for regular appeals had to be followed, *vide* sections 35 and 39. By section 36 the provisions of the Code as to adding parties, adjournments, death, marriage and insolvency of parties, summoning of witnesses and their attendance, examination of parties and witnesses, production of documents and commission to examine witness and to make local inquiry were made applicable so far as they could be. The present Act, section 53, makes the Code applicable generally to all proceedings under the Act, except where inconsistent with anything in the Act itself. This would appear to be a notable departure from the policy of the previous Act In our opinion therefore adjudication as to compensation or apportionment of compensation is tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure, though called an award *in the Act. There is an overwhelming* mass of authority *for treating* the award of the Court as a decree for purposes of appeal: see *Sheo Rattan Rai* v. *Mohri*(1), *Mahomed Ali Amjad Khan* v. *Secretary of State for India*(2). The memorandum of appeal is stamped as one from an original decree. As far as we know there is no authority to the contrary The judgment of Their Lordships of the Privy Council in *Rajah Nilmoni Singh* v *Ram Bhundhoo Roy*(3) to the effect that the settling of the amount or of the distributing of the compensation by the Court is final and conclusive, supports the same conclusion.

There is no good ground whatever for holding such a decree to be merely a declaratory one. Not only is there nothing in the Act to support the contention, but the whole scheme of the Act seems to negative any such conclusion. Under the Act when a reference is made to the Court the Collector is required by section 31 to deposit the amount of compensation under his award in the Court, and the remaining sections of Part V of the Act show that the Court is vested with plenary authority in dealing with the money. It is not reasonable to infer under the circumstances that the Court's adjudication is merely declaratory, and that it is incompetent to take any action in respect of its award or decree. The provisions aforesaid clearly require it to take action in various ways. A statute framed for a particular object ought to be deemed sufficient in itself, in the absence of clear indications to the contrary, to carry out that object. Moreover, the Legislature cannot be presumed to favour multiplicity of proceedings.

We therefore hold on the first point that the award is a decree which is capable of execution."

This decision was not referred to in *Laddha Ebrahim's case*(4). But it appears to us that reading together sections 53 and 54 of the Land Acquisition Act with section 96 of the Code of Civil Procedure, it must be taken to have been the intention of the Legislature to put awards under the Land Acquisition Act on

(1) (1899) 21 All. 354.
(2) (1903) 30 Cal. 501.
(3) (1881) L. R. 8 I. A. 90.
(4) (1910) 35 Bom. 146.

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

the footing of decrees. Otherwise we cannot understand how the procedure applicable to appeals from original decrees can be made applicable to what are not decrees.

It is perfectly true, as Mr. Rao argued, that by section 2 of the Code of Civil Procedure "decree" is defined as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" The word "suit" has not been defined in the Code of Civil Procedure, and the latter half of section 582 of the former Code of Civil Procedure, in which it was declared to include an appeal in certain cases has not been reproduced in the new Code of Civil Procedure. But it has been held in Calcutta, with reference to the Bengal Court of Wards Act IX of 1879, that the term "suit" includes all contentious proceedings of an ordinary civil kind, whether they arise in a suit or proceedings see *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy Chowdhry*[1] and *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia*[2]. In a later case, however, a less certain view seems to have been taken, and it was said that a "suit" ought to be confined to such proceedings as, under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits. See *Watkins* v. *Fox*[3].

We do not find anything in the Land Acquisition Act inconsistent with the view we are putting forward; and section 53 of that Act has the operation of putting proceedings before the Court on the same footing as proceedings in a suit, it seems to us.

If we are right in saying that the award is a decree, then section 93 of the Code of Civil Procedure lays down that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(1) (1891) 18 Cal. 500 at p. 501.
(2) (1868) Ben. L. R. Sup. Vol. 985 at pp. 988, 990.
(3) (1895) 22 Cal. 913 at p. 918.

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

been almost entirely assimilated to those of an ordinary civil suit. The former Act prescribed a special procedure which had to be followed by the Court, and in the matter of appeal the provisions of the Code of Civil Procedure for regular appeals had to be followed, *vide* sections 35 and 39. By section 36 the provisions of the Code as to adding parties, adjournments, death, marriage and insolvency of parties, summoning of witnesses and their attendance, examination of parties and witnesses, production of documents and commission to examine witness and to make local inquiry were made applicable so far as they could be. The present Act, section 53, makes the Code applicable generally to all proceedings under the Act, except where inconsistent with anything in the Act itself. This would appear to be a notable departure from the policy of the previous Act In our opinion therefore adjudication as to compensation or apportionment of compensation is tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure, though called an award in the Act There is an overwhelming mass of authority for treating the award of the Court as a decree for purposes of appeal : see *Sheo Rattan Rai* v *Mohri*(1), *Mahomed Ali Amjad Khan* v. *Secretary of State for India*(2). The memorandum of appeal is stamped as one from an original decree As far as we know there is no authority to the contrary The judgment of Their Lordships of the Privy Council in *Rajah Nilmoni Singh* v. *Ram Bhundhoo Roy*(3) to the effect that the settling of the amount or of the distributing of the compensation by the Court is final and conclusive, supports the same conclusion

There is no good ground whatever for holding such a decree to be merely a declaratory one. Not only is there nothing in the Act to support the contention, but the whole scheme of the Act seems to negative any such conclusion. Under the Act when a reference is made to the Court the Collector is required by section 31 to deposit the amount of compensation under his award in the Court, and the remaining sections of Part V of the Act show that the Court is vested with plenary authority in dealing with the money. It is not reasonable to infer under the circumstances that the Court's adjudication is merely declaratory, and that it is incompetent to take any action in respect of its award or decree. The provisions aforesaid clearly require it to take action in various ways. A statute framed for a particular object ought to be deemed sufficient in itself, in the absence of clear indications to the contrary, to carry out that object Moreover, the Legislature cannot be presumed to favour multiplicity of proceedings.

We therefore hold on the first point that the award is a decree which is capable of execution."

This decision was not referred to in *Laddha Ebrahim's case*(4). But it appears to us that reading together sections 53 and 54 of the Land Acquisition Act with section 96 of the Code of Civil Procedure, it must be taken to have been the intention of the Legislature to put awards under the Land Acquisition Act on

(1) (1899) 21 All. 354.
(2) (1903) 30 Cal. 501.
(3) (1881) L R 8 I. A. 90
(4) (1910) 35 Bom. 116.

the footing of decrees. Otherwise we cannot understand how the procedure applicable to appeals from original decrees can be made applicable to what are not decrees

It is perfectly true, as Mr. Rao argued, that by section 2 of the Code of Civil Procedure "decree" is defined as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit". The word "suit" has not been defined in the Code of Civil Procedure, and the latter half of section 582 of the former Code of Civil Procedure, in which it was declared to include an appeal in certain cases has not been reproduced in the new Code of Civil Procedure. But it has been held in Calcutta, with reference to the Bengal Court of Wards Act IX of 1879, that the term "suit" includes all contentious proceedings of an ordinary civil kind, whether they arise in a suit or proceedings: see *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy Chowdhry*[1] and *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia*[2]. In a later case, however, a less certain view seems to have been taken, and it was said that a "suit" ought to be confined to such proceedings as, under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits See *Watkins* v. *Fox*[3].

We do not find anything in the Land Acquisition Act inconsistent with the view we are putting forward; and section 53 of that Act has the operation of putting proceedings before the Court on the same footing as proceedings in a suit, it seems to us.

If we are right in saying that the award is a decree, then section 96 of the Code of Civil Procedure lays down that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(1) (1891) 18 Cal. 500 at p. 501.

(2) (1868) Beng. L. R. Sup. Vol. 985 at pp. 988, 990.

(3) (1895), 22 Cal. 943 at p. 948.

1911.

NATHUBHAI NARANDAS v. MANORDAS LALDAS.

Now, the amount in dispute being less than Rs. 5,000, by Bombay Civil Courts Act XIV of 1869, section 16, the appeal lies to the District Judge, which by that section "is the Court authorized to hear appeals from the Subordinate Judge". See section 96 of the new Civil Procedure Code. And this has been expressly so held in *Ranchhodbhai Valabhai* v. *The Collector of Kaira*[1], where the learned Judges Chandavarkar and Heaton, JJ, apply the reasoning in *Laxmi* v. *Aba*[2]. With regard to this decision, however, it is to be observed that in the case of *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra*[3], where the amount in dispute was less than Rs. 5,000, the Calcutta High Court held that the appeal lay to the High Court There at p 529 the learned Judges say as follows —

"Upon the question raised in the rule, namely, whether the District Judge was right in holding that the appeals in these cases lay not to his Court, but to the High Court, we are of opinion that the answer ought to be in the affirmative. It is true that by section 39 of Act X of 1870, it was provided that the appeal shall lie to the High Court, unless the judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge, but that Act has been repealed by Act I of 1894, and the only saving clause is that in sub-section (2) of section 2, which provides that all proceedings commenced under the Land Acquisition Act (X of 1870) shall, as far as may be, be deemed to have been commenced under the Act of 1894. We must therefore look to the provisions of Act I of 1894 to see whether an appeal lies or not, and if any appeal lies, to what Court

"Now section 54 of Act I of 1894 enacts 'Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act.' The proceedings in these cases, though commenced under the old Act, must, by virtue of the provisions of sub-section (2) of section 2 of Act I of 1894, be deemed to be proceedings under the latter Act. That being so, section 54 would apply to the case, and under that section the appeals lie to the High Court."

But in accordance with the usual practice in these cases we must follow the judgment in *Ranchhodbhai* v. *Collector of Kaira*[1] above referred to, and hold that no appeal lies in this case to this Court.

(1) (1909) 33 Bom. 371. (2) (1908) 32 Bom. 631.
(3) (1896) 23 Cal. 526.

1911.

NATHUBHAI NARANDAS
v.
MANORDAS LALDAS.

But the question remains whether a second appeal lies to this Court from the decision of the District Court sitting in appeal from an award of the Assistant Judge's Court made under the Land Acquisition Act.

Under section 100 of the Code of Civil Procedure a second appeal lies to this Court from any *decree* passed in appeal by a Court subordinate to it. In the Punjab case above cited it was held that an award made by a District Court under the Land Acquisition Act is a decree, because section 53 of the Act directed that the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the former Act. A decision of the District Court under the Land Acquisition Act is called in the Act itself an "award" and the question of appeal is dealt with in section 54 Only one appeal is allowed by that section, the right to appeal is a creature of Statute. Had it been the intention of the Legislature to allow a right to a second appeal also in such cases, it would have said so. We cannot infer such a right merely from the language of section 53, because had the general words of that section been intended by the Legislature to apply not only to the provisions of the Code relating to appeals but also to second appeals, section 54 would have become unnecessary. The irresistible inference is that no second appeal lies to this Court from an award made by a District Court in appeal from an award made by an Assistant Judge's Court, whether the award is treated as a decree or not.

This second appeal must, therefore, be dismissed with costs on the ground that it does not lie

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912, *January 3.*

NARHAR RAGHUNATH NAPHAD AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. KRISHNAJI GOVIND NADGAVANDI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 48—Decree—Execution—Limitation—Decree ripe for execution.

On the 14th December 1892, the plaintiffs obtained a decree against the defendants. It directed (1) that the plaintiffs should be put in possession of certain land mortgaged to them by the defendants, and that the former should enjoy the profits of the land for 20 years, in satisfaction of the amount due on the mortgage; (2) that the defendants should pay to the plaintiffs a certain amount of money annually in the nature of cash allowance, (3) that if in any year the defendants failed to make the payment, the plaintiffs were entitled to bring to sale the mortgaged land and get the money debt satisfied out of the sale proceeds, and (4) that if there should be "any deficit or any just and legal obstruction of whatever nature" to the mortgaged property being sold, the plaintiffs were entitled to recover the deficiency in respect of the cash allowance from the defendants "personally and from their other property." The defendants made default in the payment of the cash allowance in 1893 with the result that the plaintiffs brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold, but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, he was about to bring to sale the rest of the mortgaged property in 1908, when the Collector intervened and had the impending sale stopped on the ground that it was *vatan* property. On the 19th December 1910, the plaintiffs filed the present *darkhast* to recover the balance by enforcing the personal remedy against the defendants. The lower Court rejected the application on the ground that it was barred under the provisions of section 48 of the Civil Procedure Code of 1908.

Held, that the application was not barred under section 48 of the Civil Procedure Code of 1908, for the twelve years' period ran only from the date when the decree became in all its parts ripe for execution. The decree became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part, until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree-holder could not till that point of time make any application for execution which it was in the power of the Court to grant, because till then there was no decree ripe for execution, so far as the personal remedy was concerned.

Per Curiam.—The execution and application contemplated by section 48 of the Civil Procedure Code of 1908, relate to a decree which is executable at that date in respect of the application made and execution sought, and the "order for

* First Appeal No. 126 of 1911.

execution" contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree. 1912.

APPEAL from the decision of V. N. Rahurkar, First Class Subordinate Judge of Satara

Proceedings in execution.

The decree under execution was obtained by the plaintiffs against the defendants on the 14th December 1892. It provided *inter alia* as follows :—

The plaintiff do recover from all the defendants Nos 1, 2 and 3 the amount claimed, *viz.* Rs. 6,800, further interest and costs during a period of 20 (namely twenty) years from this day's date as follows :—The plaintiff shall recover the revenue of all the mortgaged property which is referred to in the plaint and which has been in his possession and of the property which the defendants have further mortgaged by Exhibit 25 being the pursis statement, *i. e.*, the revenue which is recoverable now and which may be recoverable in future on cultivation agreement and the revenue settlement and shall pay all the Government dues, *viz.*, Government Judi, etc., and out of what may remain he shall deduct Rs 25 for administration of each year and shall apply the whole of the remaining income towards the payment of the interest on the amount of claim. As to what will remain after payment of interest, the same shall be received towards the payment of the principal sum in the following manner —Account of interest shall be made in the case of Rs. 4,000 (*viz.* four thousand) at the rate of 8 annas per mensem per centum and in the case of Rs. 2,800 at the rate of 10 annas per mensem per centum from year to year and the amount of income as stated above shall be received towards the payment of the whole of that interest. The account of interest shall be made as from the month of Kartik every year up to the end of Ashwin of next year. The first year shall commence from the first of Kartik Shud in the Shak year 1814 and end with the 30th of Ashwin in the Shak year 1815. In this manner the plaintiff shall recover the profits of the mortgaged property for 20 twenty years, that is to say up to the end of the month of Ashwin of the Shak year 1834 ; on the expiration of the fixed time the defendants shall forthwith pay to the plaintiff the amount which may be found due to the plaintiff on the accounts being made. As regard the expenses which may be incurred in connection with the realization of the income, the plaintiff shall recover the same together with interest at the above rate of 10 annas from the income every year. The defendants shall after the period of twenty years on the payment of the whole amount get back the mortgaged property from the plaintiff. Should any amount remain unpaid by the tenants the plaintiff shall not be responsible for the same. Until the satisfaction of this debt the defendants shall not cause any obstruction to the mortgaged property and if any other obstruction shall be caused, the defendants shall get them removed. As to the cash allowance which is receivable from the Government in the name of the defendants, the defendants shall every year receive the same at the proper time for the plaintiff and pay the same to the plaintiff in time. In default of any of the abovementioned

1912.

NARHAR RAGHUNATH v. KRISHNAJI GOVIND.

conditions the plaintiff shall, at that very time (of default) without listening to the excuse of the unexpired period, recover the amount of his claim which m[ay] be found due on account being made, together with costs of the suit by the sale [of] the whole of the mortgaged property. Should there be any deficit or any just a[nd] legal obstruction of whatever nature be caused to the mortgaged property bei[ng] sold, the same shall be recovered from the defendants personally and from th[eir] other property.

The defendants made default in the payment of the allowanc[e] to the plaintiffs in 1893 The plaintiffs thereupon applie[d] to execute the decree by sale of the property A portion of th[e] property was sold, but as the sale-proceeds were not sufficien[t] to discharge the decree in full, the plaintiffs applied to hav[e] the remainder of the property sold The Collector intervene[d] in 1908; and the property was not sold as it was *vatan* property.

On the 19th December 1910, the plaintiffs filed the present *darkhast* praying to recover the balance of the decretal amount by enforcing the personal remedy against the defendants.

The Subordinate Judge held that the *darkhast* was barred by the provisions of section 48 of the Civil Procedure Code of 1908, as the period of twelve years commenced to run from the defendants' default in payment in 1893.

The plaintiffs appealed

Coyaji, with *K H Kelkar*, for the appellants

Shortt, with *M V Bhat*, for the respondents.

CHANDAVARKAR, J —In holding the execution of the decree in the *darkhast* before us barred under section 48 of the Code of Civil Procedure, the lower Court has overlooked the important consideration that the decree contemplated by the section should have been in all its parts ripe for execution on the date from which the twelve years' period of limitation is computed

The decree in the present case was passed on the 14th of December 1892 and the present *darkhast* was presented on the 19th of December 1910. The decree consisted of four parts. In the first place, it directed that its holder should be put in ... him by the judgment- ... the profits of the land

for twenty years, in satisfaction of the amount due on the mortgage. The second part ordered the judgment-debtors to pay to the decree-holders a certain amount of money annually in the nature of cash allowance. The third part directed that if in any year the judgment-debtors should fail to make the payment, the decree-holders should bring to sale the mortgaged land and get the money debt satisfied out of the sale-proceeds. Lastly—and this is the part of the decree with which we are now concerned for the purposes of the twelve years' limitation under section 48—the decree provided that if there should be "any deficit or any just and legal obstruction of whatever nature" to the mortgaged property being sold, the decree-holders should recover the deficiency or whatever might be due in respect of the cash allowance from the judgment-debtors "personally and from their other property".

The judgment-debtors made default in the payment of the cash allowance in 1893 with the result that the decree-holders, in compliance with the terms of the third part of the decree, brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold; but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, they were about to bring to sale the rest of the mortgaged property when the Collector intervened and had the impending sale stopped on the ground that it was *vatan* property.

It was at this point—in the year 1908—that the decree became for the first time capable of execution in respect of the personal remedy given to the decree-holders in the fourth and last part. Until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree-holders could not till that point of time make any application for execution which it was in the power of the Court to grant, because till then there was no decree ripe for execution, so far as the personal remedy was concerned.

When section 48 of the Code provides that "where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the

1912.

NARHAR RAGHUNATH v. KRISHNAJI GOVIND.

same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed ", the execution and application contemplated relate to a decree which is executable at that date in respect of the application made and execution sought, and the " order for the execution " contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree. This construction is supported by the ruling of the Allahabad High Court in *Muhammad Suleman Khan* v. *Muhammad Yar Khan*[1] on the interpretation of Article 179 of the Limitation Act of 1877. The first paragraph of that article provided for the execution of a decree three years' limitation " from the date of the decree". It was held that the paragraph " must necessarily apply only where there is a decree or order which can at its date be executed "

In the present case the decree-holders were not in a position to make any application for the execution of the decree against the judgment-debtors personally until there had been an arrest of the enforcement of the remedy given to them by the third part of the decree Nor was the Court competent to grant the personal remedy until that arrest. When that contingency happened, the personal decree, which had been till then provisional and ancillary, became effective, and the application to enforce the personal remedy took the place of, as having been ancillary to, the previous proceedings in execution under the third part of the decree, rendered abortive by the Collector's order under the Vatan Act *Rahim Ali Khan* v. *Phul Chand*[2].

On these grounds the decree appealed from must be reversed and the *darkhast* remitted to the Court below to be disposed of on the merits according to law. The respondents must pay to the appellants the costs of this appeal. Other costs of the *darkhast* to abide the result.

Decree reversed.

R. R.

(1) (1894) 17 All. 32.

(2) (1896) 18 All. 452.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Russell, Mr. Justice Chandavarkar, Mr. Justice Batchelor, and Mr. Justice Heaton.

MAHADEV SAKHARAM PARKAR (ORIGINAL PLAINTIFF), APPELLANT, v. JANU NAMJI HATLE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1912. January 5.

Civil Procedure Code (Act XIV of 1882), sections 263, 264, 318 and 319—Civil Procedure Code (Act V of 1908), Order XXI, rule 5 (2)—Court-sale—Symbolical possession by purchaser—Judgment-debtor remaining in actual possession—Limitation.

Merely formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Gopal v. *Krishnarao*[1] and *Mahadeo* v. *Parashram Bhawanchand*[2], overruled.

SECOND appeal against the decision of M. P. Khareghat, District Judge of Ratnagiri, confirming the decree of S S Wagh, Subordinate Judge of Malvan.

The plaintiff sued to obtain by partition one-tenth share in the khoti village of Gotne, alleging that he purchased at a Court-sale one-twentieth share of Bhoju Suryaji Hatle and one-twentieth share of Gunaji Mahadaji Hatle on the 15th September 1887, that the sale was confirmed on the 21st October 1887, that he was given possession on the 14th November 1890, that he obtained possession of some land which was in the possession of the judgment-debtors and that he used to receive *faida* (profit) according to his share. The suit was filed on the 14th November 1902.

The defendants, who were seventy-two in number consisting of co-sharers, mortgagees and purchasers, all resisted the claim as time-barred.

* Second Appeal No. 553 of 1906.

(1) (1900) 25 Bom. 275. (2) (1900) 25 Bom. 358.

1912.

MAHADEV SAKHARAM v. JANU NAMJI HATLE.

The Subordinate Judge found that the claim was time-barred under Article 138, Schedule II, of the Limitation Act, and he dismissed the suit.

On appeal by the plaintiff the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

K. N. Koyaji for the appellant (plaintiff).

A. G. Desai for respondents 2, 5, 10, 11, 23, 25 and 31 (defendants 2, 5, 10, 11, 23, 25 and 35).

P. M. Vinekar for respondent 38 (defendant 39).

The second appeal was argued before Scott, C. J., and Heaton, J., on the 8th October 1909 and the case was remanded for findings upon the following issues :—

(1) Was the land in suit or any and what part of it joint family property at the date of the sale to the plaintiff?

(2) If any of the property is joint family property, has the judgment-debtor or the plaintiff been excluded to his knowledge from enjoyment of the same; and if so, from what date?

(3) If the land in suit was not joint family property, how was it held—whether in undivided or divided shares, and when did any partition take place?

(4) At the date of the sale to the plaintiff, were the judgment-debtors whose rights he acquired, entitled to any and what share in the property in suit?

(5) What was the arrangement between the khoti sharers regarding the distribution of khoti profits at the date of the sale to the plaintiff, and had the judgment-debtors whose rights were acquired by the plaintiff, any and what interest in those khoti profits?

(6) What kind of possession could the judgment-debtors at the date of the sale to the plaintiff have obtained against the defendants?

On the said issues the District Judge (Mr. P. J. Taleyarkhan) found as follows :—

(1) The entire village in suit was joint family property in the sense that though there was separation of interest among the members of the family and different members were for convenience of enjoyment in possession of different portions of the property, the property was liable to be formally and finally partitioned at the suit of any of the sharers in accordance with their strict legal rights.

(2) The judgment-debtors were never excluded. The plaintiff was kept out of enjoyment ever since his purchase, presumably to his knowledge. He was however kept out by the judgment-debtors' successive heirs and as against such of them as

are now in possession of the shares of the judgment-debtors limitation is saved by reason of plaintiff obtaining symbolical possession within twelve years before suit. The other defendants were not in possession of those shares, and are parties to this suit merely because the plaintiff seeks a general partition.

(The suit is in my opinion governed by Article 144 and not by Article 127 of the Limitation Act; and as there was a break in the continuity of adverse possession by reason of plaintiff's symbolical possession of 14th November 1890, the claim is not time-barred.)

(3) Does not arise.

(4) The judgment-debtors Bhoju Suryaji was entitled to a $\frac{1}{40}$th share, and Gunaji Mahadji to a $\frac{1}{80}$th share

(5) Representatives of the two main branches used to manage the village and collect the khoti profits every alternate year and distribute them among their sub-sharers. The judgment-debtors' shares in the profits were as stated in (4).

(6) This issue does not arise as the judgment-debtors' heirs were in possession of their shares at the date of the sale. If they had not been in possession they could either have recovered possession of the property which they were previously enjoying separately (under the provisional family arrangement) from those who dispossessed them, or they could have brought a suit for general partition against all the sharers.

Against the said findings the appellant as well as the respondents put in cross-objections and the case was argued before Scott, C. J., and Batchelor, J., who being of opinion that the question involved in the case should be considered by a Full Bench, the following referring judgment was delivered on the 2nd January 1912 by

SCOTT, C. J. :—The learned Judge in his judgment on remand has found that the plaintiff was kept out of enjoyment of the interests purchased by him by the judgment-debtors' successive heirs and that as against such of them as are now in possession of the shares of the judgment-debtors limitation is saved by reason of the plaintiff obtaining symbolical possession within twelve years before suit. He finds that the *vahivat* was actually with the judgment-debtors and their representatives and not that the shares were in the possession of tenants.

The material dates are as follows:—The plaintiff purchased at a Court-sale the rights of the judgment-debtors on the 15th September 1887. He purported to take formal possession through the Court on the 14th November 1890. The suit was

1912.

MAHADEV SAKHARAM v. JANU NAMJI HATLE.

filed on the 14th November 1902. As the judgment-debtors were in possession at the date of sale the possession has been adverse to the plaintiff unless the so-called formal possession gives a fresh starting point for limitation.

The learned Judge observes that the plaintiff's claim is clearly in time "for as between the auction-purchaser and the judgment-debtor or his heirs symbolical possession is as good as actual possession (I. L. R. 25 Bom. 275 and 358)". In the first of these cases *Gopal* v. *Krishnarao*[1], it was held that limitation commenced to run against a purchaser at a Court-sale only from the date of formal possession and not from the date of purchase. Mr. Justice Ranade in the judgment purported to base the decision upon *Juggobundhu Mukerjee* v. *Ram Chunder Bysack*[2], *Juggobundhu Mitter* v. *Purnanund Gossami*[3] and *Lakshman* v. *Moru*[4]. It appears to us that none of these cases support the conclusion in *Gopal* v. *Krishnarao*[1] unless the latter can be treated as a case where the property purchased was in the possession of tenants so as to render formal possession under section 319 of the Code of 1882 the only possible method of taking possession. The facts reported however do not support any such case. In *Juggobundhu Mukerjee* v. *Ram Chunder Bysack*[2] formal possession of land in the possession of tenants given under section 224 of the Act of 1859 (corresponding with section 264 of the Act of 1882) was given effect to as against the judgment-debtor-defendant and similarly in *Joggobundhu Mitter* v. *Purnanund Gossami*[3] formal possession obtained under section 319 was given effect to against the judgment-debtor-defendant, as it was the only mode in which the Court could give the purchaser possession.

In *Lakshman* v. *Moru*[4] the plaintiff had a decree for possession which he should have enforced by obtaining actual possession under section 263. Instead of doing so he only took formal possession although it was not a case in which the procedure under section 264 was applicable. Telang, J., said "the rule,

(1) (1900) 25 Bom. 275.
(2) (1880) 5 Cal. 584.
(3) (1889) 16 Cal. 530.
(4) (1892) 16 Bom. 722 at p. 727.

therefore, as finally laid down in Calcutta, is that where possession is given under section 264 of the present Civil Procedure Code, corresponding with section 224 of the old Code, that possession, though only 'formal' or 'symbolical', is equivalent to an actual possession as between the purchaser and the judgment-debtor, and limitation . . runs in favour of the judgment-debtor, not from the date of the sale . . . but from the date of the subsequent dispossession". Telang, J., further takes exception to the dictum of Parker, J., in *Venkatramanna* v. *Viramma*[1] that there was no difference in the operation of sections 263 and 264 on this point.

The other case relied on by the learned District Judge is *Mahadeo* v. *Parashram Bhawanchand*[2]. The decision is professedly based upon that in *Gopal* v *Krishnarao*[3].

It appears to us that these two cases are inconsistent with the judgment in *Lakshman* v. *Moru*[4] The question, therefore, arises for the decision of a Full Bench whether merely formal possession of immoveable property by a purchaser at a Court-sale can prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

The question was argued before a Full Bench consisting of Scott, C. J., Russell, Chandavarkar, Batchelor and Heaton, JJ.

K. N. Koyaji for the appellant (plaintiff):—The Code of Civil Procedure is not exhaustive. Sections 264 and 319 of the Code of 1882 provided for cases where the property was in the possession of tenants or other persons entitled to occupy it, but did not provide for cases where joint possession was to be given to the auction-purchaser along with the judgment-debtor. In such cases formal possession can and should be given. By Order XXI, rule 35, of the Code of 1908, provision is now made for formal possession to be given to judgment-creditors entitled to joint possession, but a similar provision is not made in rule 96 of the same Order which deals with purchasers being put in

(1) (1886) 10 Mad 17.
(2) (1900) 25 Bom. 358.
(3) (1900) 25 Bom. 275
(4) (1892) 16 Bom 722.

1912.

MAHADEV SAKHARAM v. JANU NAMJI HATLE.

possession. We submit that the Court has inherent power, apart from the Code, to give formal or actual possession according to the exigencies of a case.

But if formal possession can be given in execution in those cases only which are provided for in the Code, then we cannot support *Gopal* v. *Krishnarao*[1] and *Mahadeo* v. *Parashram Bhawanchand*[2]. The Calcutta Full Bench cases relied upon in *Gopal* v. *Krishnarao*[1] were cases of property in the possession of ryots and tenants

A. G. Desai for respondents 2, 5, 10, 11, 23, 25 and 34 (defendants 2, 5, 10, 11, 23, 25 and 35), not called upon.

P. B. Shingne for respondent 38 (defendant 39), not called upon.

The judgment of the Full Bench was delivered by

SCOTT, C J.—We answer the question referred in the negative. Symbolical possession is not real possession nor is it equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Sections 264 and 319 of the Code of 1882 prescribed and impliedly gave effect to symbolical possession under certain specified conditions but symbolical possession was neither prescribed nor recognised by sections 263 or 318 of that Code or by the corresponding sections of the earlier Codes, nor in our opinion do the Bengal Full Bench decisions, *Juggobundhu Mukerjee* v *Ram Chunder Bysack*[3] and *Joggobundhu Mitter* v. *Purnanund Gossami*[4] suggest the contrary.

Under the new Code of 1908, rule 35 (2) of Order XXI provides one additional case in which symbolical possession may be resorted to.

We overrule *Gopal* v. *Krishnarao*[1] and *Mahadeo* v. *Parashram Bhawanchand*[2], which, we think, were wrongly decided.

Decree confirmed.

G. B. R.

(1) (1900) 25 Bom. 275.
(2) (1900) 25 Bom 358.
(3) (1880) 5 Cal. 584
(4) (1889) 16 Cal. 530.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

NATHUBHAI DHIRAJRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI HANSGAVRI (ORIGINAL DEFENDANT), RESPONDENT.*

1912. *January 2*

Hindu Law—Right of way—Impartible property—Presumption of law—Implied reservation of right of way on partition of estate—Mitakshara—Mayukha.

Under Hindu Law, in the absence of anything to show that at a partition a passage was allotted to either one party or the other exclusively, the presumption is that it continued joint and undivided even after the partition That presumption must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share.

According to the Mitakshara and the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are indivisible: and if there is no evidence that at the partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Broach, reversing the decree passed by P. C. Desai, Subordinate Judge at Broach.

Suit to establish a right of way.

The plaintiff and the defendant owned contiguous houses in front of which lay an open piece of ground Those houses originally belonged to a common ancestor of the parties, one Vasantrai Dayaram Vasantrai had two sons, Dhirajram (the father of plaintiff) and Harinath (the father of defendant's husband). In the year 1858, Dhirajram and Harinath divided the property between themselves, each one taking a house. In the deed which recorded the partition no mention was made as to any right of way.

The plaintiff claimed that he had a right to pass upon the open piece of ground that lay in front of the defendant's house, (1) to reach another house of the plaintiff which lay beyond; (2) to use a privy which was at the other end of the defendant's land; and (3) to pass upon the land as an easement of necessity.

* Second Appeal No. 363 of 1910.

1912.

NATHUBHAI DHIRAJRAM v. BAI HANSGAVRI.

It was shown that the plaintiff had no easement of necessity to pass upon the land, inasmuch as he had already two other ways for egress and ingress. It also appeared that the privy had been closed up at least as far ago as the year 1880.

The Subordinate Judge, however, decreed the plaintiff's right, on the ground "that the way in dispute passed to the plaintiff's father, by the doctrine of implied reservation, as being necessary, for enjoying the share of the property in the way in which it was enjoyed at the time of partition.".

On appeal, the District Judge did not go into the question of implied reservation, but reversed the decree on the ground that the plaintiff had not established his right to go over the land in question.

The plaintiff appealed to the High Court

L. A. Shah for the appellant.

Ratanlal Ranchhoddas for the respondent.

CHANDAVARKAR, J.—The suit was brought by the present appellant for a perpetual injunction to restrain the respondent from interfering with his right of way over a certain passage.

The Subordinate Judge who tried the suit looked at the question of the plaintiff's right in two aspects, first, as a right by way of implied reservation, secondly, as a right by way either of easement or prescription. On both these points he came to the conclusion that the plaintiff had established his right to the passage in question. Accordingly a decree as prayed for was made.

But in appeal the learned District Judge has held that the appellant-plaintiff has failed to prove that he has used as of right the passage in dispute for the statutory period required for an easement or prescriptive right.

It is contended in support of this second appeal that the learned District Judge has not applied himself to the question of implied reservation to which the learned Subordinate Judge had very carefully addressed himself. That contention of the appellant's pleader must be allowed.

It is urged by Mr. Ratanlal for the respondent, that the plaint and the pleadings did not raise a title based on implied reservation The plaint and the pleadings show it is not so. The plaintiff's case all along has been that at one time the plaintiff's and defendant's houses were commonly enjoyed by them; that this passage which is now in dispute was also a common way for the members of the family. It was upon that basis that the Subordinate Judge dealt with the case. And if the case of a right by way of implied reservation was distinctly raised by the parties, and dealt with by the Court of first instance, the appellate Court was bound to consider it and dispose of it, unless the plaintiff had at the hearing of the appeal abandoned it, expressly or impliedly. There is nothing on the record of the lower appeal Court to show that it was abandoned.

No doubt from the fact that the District Judge has dealt with the plaintiff's case as it concerned the right of easement or prescription, it may be inferred that that was the only case relied upon by the appellant in resisting the appeal in the lower Court. But that inference would be obviously out of place here, because the main facts found by the learned District Judge of themselves are sufficient in law to raise the question of a right by way of implied reservation. And those facts must be presumed to have been found by the Judge on argument by both or either of the parties.

Now, what are those facts found by the Judge on the evidence?

He finds that the plaintiff's and defendant's houses belonged originally to a common owner, their grandfather Vasantrai, whose sons divided the properties, that the plaintiff admits that the right of way was not expressly reserved by his father, when the partition was effected; and that the partition took place in Samvat 1914, *i e.*, A.D. 1858.

These facts are sufficient in law to raise the presumption that the passage in dispute was reserved as the common or joint property of the parties at the time of partition. That is a presumption of Hindu Law. In the absence of anything to

show that at the partition the passage was allotted to either one party or the other exclusively, the presumption is, that it continued joint and undivided even after the partition. That presumption of Hindu Law must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share. This presumption of law has not been borne in mind by the learned District Judge in the Court below. Whether according to the Mitakshara or the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are *indivisible*; and if there is no evidence that at a partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question (Vyavahara Mayukha. Mandlik's Edition, page 70, lines 13 to 15, and page 71, lines 11 and 12).

If that is so, then the burden of proof lay upon the respondent to show that the plaintiff did not possess the right claimed, or having possessed at one time, *i.e.*, at the time of partition, he has since lost it, either by the adverse possession of the respondent or in some other way recognized by law. So also under the Easements Act the appellant's right is clear. If these two houses were common, and the right of way belonged to the parties, and the passage was common, then it must be presumed in the absence of any express agreement between the parties, that at the partition the passage was reserved for common enjoyment.

Therefore, from whichever point of view we look at the question, whether from the point of view of Hindu Law, or of the law as laid down in the Easements Act, the plaintiff's right is *primâ facie* established. And the question is whether the respondent has discharged the onus which lay upon him. Now, under the new Code of Civil Procedure, where th appellate Court has omitted to decide any question of fac which arises upon the appeal, and which is necessary for th settlement of the dispute between the parties, this Cou in second appeal has jurisdiction to dispose of t

1912.

NATHUBHAI DHIRAJRAM v. BAI HANSGAVRI.

question of fact for itself. Dealing with this question of fact, we think, the Subordinate Judge's conclusion must be accepted. He has pointed out circumstances which show that this passage has been used as a way and that both the defendant and the plaintiff have been enjoying the right. It is unnecessary to go into the reasons which the learned Subordinate Judge has given after considering the evidence upon the record, but it is sufficient to say that this Court accepts his appreciation of the evidence.

The District Judge's decree must be reversed and the Subordinate Judge's decree restored with costs both of this second appeal and of the appeal in the lower Court on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Russell.

1912. *January* 10.

RANGUBAI *bhratar* KRISHNAJI RAMCHANDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SUBAJI RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), RESPONDENTS, AND SUBAJI RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), APPELLANTS, *v.* RANGUBAI *bhratar* KRISHNAJI RAMCHANDRA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS *

Hindu Common Law—Widow—Right to maintenance—Grant of arrears—Exigencies of the case.

By Hindu Common Law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies.

The grant of arrears of maintenance depends on the wants and exigencies of the widow as proved in each particular case.

CROSS SECOND appeals against the decision of E. Clements, District Judge of Belgaum, modifying the decree of E. H. Waterfield, Assistant Judge.

* Cross Second Appeals Nos. 476 and 477 of 1910.

1912.

RANGUBAI v. SUBAJI RAMCHANDRA.

Suit to recover arrears of maintenance.

The plaintiff alleged that her husband died in or about the year 1900 and ever since that time she had been living with her parents. Her husband was a member of an undivided family, the annual income of which was more than Rs. 2,000. The plaintiff sought to recover Rs. 648 on account of the arrears of maintenance of nine years at the rate of Rs. 72 per annum. The suit was filed in February 1909.

The defendants answered that the plaintiff had been living with them since her husband's death up to two years before the institution of the suit, that she had over-stated the income of the family and that she had some family ornaments which should be set off against her claim for maintenance.

The Assistant Judge found that the plaintiff had been living with her parents since the death of her husband, that the income of her husband's family was more than Rs. 1,000, that the plaintiff was not in possession of any ornaments belonging to the defendant's family and that maintenance at the rate of six rupees per mensem should be given to the plaintiff from the time of her husband's death He, therefore, passed a decree for the plaintiff awarding her Rs 72 per annum from the date of her husband's death

On appeal by defendants 2 and 3, the District Judge found that Rs. 72 a year was a fair rate of maintenance, but he modified the decree by awarding to the plaintiff Rs 288 on account of the arrears of four years only on the ground that there were circumstances in the case which justified him in giving the arrears for that period. He further ordered that "maintenance for 1910 to be recovered on or after 31st December 1910."

Plaintiff and defendants 2 and 3 preferred Cross Second Appeals, Nos. 476 and 477 of 1910, respectively.

V. V. Bhadkamkar for the appellant (plaintiff) in Second Appeal No. 476 and respondent 1 (plaintiff) in Second Appeal No. 477:—The District Judge dismissed the plaintiff's suit for arrears prior to 1906 on the ground that no demand was proved. We submit that it was not necessary to prove demand

and refusal to enable a widow to claim arrears of maintenance: *Parwatibai* v. *Chatru Limbaji*[1], *Jivi* v. *Ramji*[2], *Ambabai kom Balaji* v. *Ramchandra Balaji*[3]. A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by going to reside elsewhere unless she leaves the house for an immoral purpose: *Girianna Murkundi Naik* v. *Honama*[4].

S. S. Patkar for respondents (defendants 2 and 3) in Second Appeal No. 476 and appellants (defendants 2 and 3) in Second Appeal No. 477:—The arrears of maintenance are entirely within the discretion of the Court: *Raghubans Kunwar* v. *Bhagwant Kunwar*[5]. The plaintiff was bound to prove that she was in necessitous circumstances during the period for which she claimed arrears of maintenance: *Narayanrao Ramchandra Pant* v. *Ramabai*[6]. She failed to prove it. She was living with her father and she had no necessity for maintenance.

Bhadkamkar, in reply:—The question of determining the rate at which arrears are to be awarded is in the discretion of the Court. The award of the arrears of maintenance is a matter of law and is not in the discretion of the Court: *Ambabai kom Balaji* v. *Ramchandra Balaji*[3]. A widow having thus a legal right to maintenance, her omission to make a demand can have no more legal effect than her living separate.

SCOTT, C. J.:—This is a suit by the plaintiff for maintenance which she claims from the family of her husband. She states in her plaint that she had been living with her parents since her husband's death nine years ago

The learned District Judge finds on the facts that the plaintiff has chosen to live apart from her husband's relations and has adduced no reason to justify herself in so doing. He says: "In 1896 she filed a suit in *formâ pauperis* to recover

(1) (1911) 36 Bom. 131.
(2) (1879) 3 Bom. 207.
(3) (1895) P. J. p. 44.
(4) (1890) 15 Bom. 236.
(5) (1899) 21 All 183.
(6) (1879) 3 Bom. 415.

1912.

RANGUBAI v. SUBAJI RAMCHANDRA.

maintenance, and certain exhibits show that negotiations were also being carried on at that time. But there is nothing on the record except the plaintiff's brother's uncorroborated statement to show that maintenance was demanded and refused before 1906." He, therefore, decides that maintenance should only be awarded from the 1st of January 1906.

Now, it may be that the lower Court erred in disposing of the plaintiff's claim on the ground of her failure to prove demand and refusal; we do not propose to decide the case upon that ground. But, we think, upon the findings of fact of the lower Court we must affirm the decree upon the principle stated by the Privy Council in *Narayanrao Ramchandra Pant* v. *Ramabai*[1]. In that case it was decided that by the Hindu Common Law the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. Accordingly it has been decided by a Full Bench of this Court in *Savitribai* v. *Luximibai and Sadasiv Ganoba*[2], that a widow's claim for maintenance should be regulated with reference, *inter alia*, to the amount of *stridhan* property which she has, available for her support. Similarly, in *Siddessury Dassee* v. *Janardan Sarkar*[3], Sir Francis Maclean puts the following case: "After the plaintiff had gone to her father's house, and her father through some change of fortune had become unable to maintain her, could it be fairly contended that the moral obligation of her father-in-law to maintain her had ceased, bearing in mind what has been laid down by the Privy Council in the case of *Narayanrao Ramchandra Pant* v. *Ramabai*[1], . . . namely, that by Hindu Common Law the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. In this view the moral obligation was still subsisting at the time of the father-in-law's death."

On the facts found by the lower appellate Court, we are of opinion that there is no indication that the wants and exigen-

(1) (1879) 3 Bom. 415 (2) (1878) 2 Bom. 573 at p. 584.
(3) (1902) 29 Cal. 557 at p. 569

cies of the plaintiff required a grant of maintenance prior to the 1st of January 1906.

On behalf of the appellant-plaintiff reference has been made to the *dictum* of Sir Charles Sargent in *Girianna Murkundi Naik* v. *Honama*(1), where he states : " It is now well established that a Hindu widow is not bound to reside in her deceased husband's family house, and does not forfeit her right to maintenance by going to reside elsewhere, unless she leaves the house for an improper purpose " The answer to that argument is that Sir Charles Sargent was not there concerned with the question of the grant of arrears; and what sum will be granted for arrears, must depend, as stated by the Privy Council, on the wants and exigencies of the widow as proved in the particular case.

For these reasons we affirm the decree of the lower appellate Court and dismiss the appeals with costs.

Decree affirmed.

G. B. R.

(1) (1890) 15 Bom. 236.

PRIVY COUNCIL.*

[On Appeal from the High Court of Judicature at Bombay.]

VISSANJI SONS & Co. (PLAINTIFFS) *v.* SHAPURJI BURJORJI BHAROOCHA.

1912.
May 2, 3

Guarantee—Contract, construction of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction—Contract Act (IX of 1872), sections 32, 34, 56 and 65.

The question for determination in this appeal was the construction of the following letter dated 7th August 1909, which was signed by the defendant, and given to the plaintiffs as security for the repayment of the loan of Rs. 1½ lakhs mentioned therein. " In consideration of your having at my request acceded to the proposal

---

* Present :—LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

1912.

VISSANJI SONS & CO. v. SHAPURJI BURJORJI.

of the Secretaries, Treasurers and Agents of the Tricumdas Mills' Company, Limited, to advance to the Mills Rs. 1½ lakhs, I hereby bind myself to procure a loan within two weeks of Rs 11 lakhs on the first mortgage of the Mills' block property, and to pay you thereout the said sum of Rs 1½ lakhs agreed to be advanced by you to the Mills" In a suit for damages for breach of the contract contained in the letter, the Courts in India held in favour of the defendant that "all he had undertaken to do was to procure the lending of Rs. 11 lakhs if a first mortgage of the Mills was given, and to pay thereout Rs. 1½ lakhs to the plaintiffs"

Held (reversing that decision) that on its true construction the document amounted to a substantial undertaking by the defendant that a loan of Rs. 11 lakhs should be procured, and that out of that loan the sum of Rs. 1½ lakhs should be repaid to the plaintiffs.

Semble:—Evidence of what took place after the execution of the document was not admissible on the question of its construction.

APPEAL from a judgment and decree (23rd August 1910) of the High Court at Bombay in its Appellate Jurisdiction, which affirmed a judgment and decree (11th February 1910) of the same Court in its Original Civil Jurisdiction.

In the suit out of which this appeal arose the appellants claimed from the respondent damages for breach of an agreement contained in a letter dated 7th August 1909, and the main question in dispute was as to the proper construction to be placed on the agreement.

The facts which gave rise to the suit were that the business of the Tricumdas Mills Company was mainly carried on by one Dwarkadas Dharamsey, a well-known and influential merchant in Bombay, and a partner in the firm of Tricumdas Dwarkadas and Company, who acted as the Secretaries, Treasurers and Managers of the Tricumdas Mills Company In August 1909 Dwarkadas Dharamsey, his firm, and the Tricumdas Mills Company were in financial difficulties, and on 7th August Dwarkadas applied to the appellants, also a well-known mercantile firm in Bombay, for a loan of Rs 1,50,000 to be made to the Mills, but the appellants refused to make the loan. Dwarkadas then told the appellants that he was about to raise a loan of 11 lakhs of rupees on a first mortgage of the Mills through the respondent, who was a money and loan broker in Bombay doing an extensive business, and that the advance of Rs. 1,50,000 for which he asked would be repaid out of that

loan. Being doubtful whether the respondent would induce anyone to advance the sum of 11 lakhs on the mortgage of the Mills, and whether he had any substantial lender in view, the appellants asked Dwarkadas for an assurance in writing from the respondent that he could procure such a loan.

Thereupon the appellants and Dwarkadas had a draft letter containing the proposed assurance prepared by their Solicitors which was to be put before the respondent for his signature, and on the same day (7th August) Dwarkadas called on the respondent, and informed him that the appellants required the assurance before they would make the advance, and requested him to sign the letter of assurance Prior to the above date Dwarkadas had seen the respondent and had informed him of the fact that the Tricumdas Mills Company required a loan of 11 lakhs on a first mortgage of their property, that there was then a first mortgage thereon for a sum of 6 lakhs in favour of the firm of Shivlal Motilal of Bombay, that that firm were willing and prepared to have their mortgage paid off, though in fact the due date had not then arrived, and he had requested the respondent to procure him the loan of 11 lakhs before 7th August 1909.

The respondent had in fact at the time a large sum of money belonging to a principal of his available for investment and he agreed to procure the said loan which was to be secured upon a first mortgage of the Mills.

Accordingly on 7th August 1909 the respondent was requested to, and did, sign the following letter in terms of the draft produced by Dwarkadas Dharamsey.

EXHIBIT A.

"Tullockchund and Shapoorji. 51, Apollo Street,
Bombay, 7th August 1909.

Messrs. VISSANJI SONS & CO.

Dear Sirs,

In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills a sum of Rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of Rupees eleven lakhs on the

1912.

VISSANJI SONS & CO. v. SHAPURJI BURJORJI.

first mortgage of the Mills' block property and to pay to you thereout the said sum of Rupees one lakh and fifty thousand agreed to be advanced by you to the Mills.

Yours faithfully,
S. B. BROACHA."

This letter was taken by Dwarkadas to the appellants who made an advance of Rs 1,50,000 which was secured by a promissory note signed by the Tricumdas Mills Company, and the appellants' firm of Tricumdas Dwarkadas and Company; and to that firm and the Tricumdas Mills Company the advance was debited in the books of account of the appellants' firm.

On the 9th August Dwarkadas informed the respondent that he would not require the respondent to procure the loan of 11 lakhs, as the firm of Shivlal Motilal had agreed to lend the sum of 5 lakhs to the Mills on a further mortgage. The respondent immediately wrote and informed the appellants of the refusal by Dwarkadas to make the contract with him, and told them to look to Shivlal Motilal and Dwarkadas Dharamsey to reserve for them the Rs 1,50,000 from the amount of the further loan The respondent, however, received no reply to his letter until 24th August when the appellants wrote and demanded payment of the sum of Rs. 1,50,000. Meantime the appellants had been in negotiation with Shivlal Motilal and Dwarkadas Dharamsey with a view to securing their advance to the Mills, and they received an assurance from Dwarkadas that the advance would be repaid out of the money to be received from Shivlal Motilal

On 25th August the respondent replied to the appellants' letter of demand and repudiated all liability, stating that he had been, and was then, in a position to procure and advance the loan of 11 lakhs on a first mortgage, and to carry through the transaction, but that Dwarkadas refused to mortgage the Mills to him. Shivlal Motilal gave a definite refusal to make any further advance to the Mills, and on 28th August Dwarkadas Dharamsey committed suicide. After some further correspondence between the parties the appellants on 11th October 1909 instituted the present suit against the respondent as defendant in the High Court at Bombay.

The plaint alleged that the defendant had committed a breach of contract in failing to keep his promise contained in the letter of 7th August 1909, and prayed for a decree for Rs. 1,50,000 with interest at 6 per cent. and costs.

In his written statement the defendant denied that he requested the plaintiffs to advance any money to the Mills, or that he promised to repay any such advance, and asserted that he received no consideration for the letter of 7th August 1909. He alleged that he was always ready and willing to perform what he had undertaken to do, and denied that there was any breach of contract on his part.

On the pleadings the following issues were settled :—

"1. Whether the plaintiffs advanced one and a half lakhs to the Tricumdas Mills on the faith of the letter of 7th August 1909?

"2. Whether the promise of the defendant to pay the plaintiff one and a half lakhs was not conditional upon the Tricumdas Mills granting a first mortgage of the Mills to the defendant's client for 11 lakhs?

"3. Whether the defendant was not always ready and willing to perform the promises made by him in the said letter?

"4. Whether, on the 9th August 1909, Dwarkadas Dharamsey as representing the Tricumdas Mills did not refuse to grant a first mortgage of the Mills to the defendant's client ?

"5. Whether such refusal did not render it impossible for the defendant to perform his said promises?

"6. Whether if the said promises amounted to a contract such refusal did not render the contract void?

"7. Whether the plaintiff did not treat the defendant's letter of 9th August 1909 as terminating any contract between them with reference to the sum of one and a half lakhs?"

The Judge of the Court on its Original Civil Side (BEAMAN, J.) before whom the case came for hearing, after finding that the facts were practically undisputed, held that the defendant believed that the mortgagee Shivlal Motilal was willing to be

1912.

Vissanji ons & Co. v. Shapurji Burjorji.

paid off in full; that the defendant had the 11 lakhs available for the loan which he undertook to procure, and was ready and willing to advance the said sum on a first mortgage of the Mills; that the undertaking to pay the sum of Rs. 1,50,000 out of the mortgage money contained in the letter of 7th August 1909 was conditional and contingent on the transaction of nortgage being given effect to and carried out by the loan being taken, and was not a promise unfettered by that condition; that the contingency failed in consequence of the act of Dwarkadas Dharamsey, that the fulfilment of the undertaking thereby became impossible; and that there was no breach on the part of the defendant of his contract, nor any liability on his part in respect of the sum claimed. The suit was consequently dismissed with costs

On appeal by the plaintiffs the High Court in its Appellate Jurisdiction (Sir BASIL SCOTT, C. J., and BATCHELOR, J.) upheld the lower Court's decision.

The material portion of their judgment (after stating the facts) was as follows .—

"The above facts are undisputed There is evidence that after the 9th August laintiff tried to arrange for repayment out of the monies to be advanced by Shivlal n further charge and that he made no claim on defendant till 24th August, the ay of the meeting of the creditors of Dwarkadas Dharamsey, when Shivlal had nally decided not to advance the remaining 3 lakhs.

"In the view we take of the case however what happened after the 9th of August of no importance for the purpose of our decision. The question which we have o decide is what requisition the plaintiff laid before the defendant by the draft and hat the defendant undertook by the letter of the 7th August.

"The plaintiff's present case is that he insisted on a request from the defendant or an advance of Rs. 1½ lakhs to Dwarkadas Dharamsey and the defendant's romise that he would repay that amount. If this was what he wanted it is strange hat he did not ask for a bare and absolute guarantee from the defendant instead f introducing an unnecessary reference to the first mortgage of the Tricumdas Mills.

"It appears to us that no reasonable businessman in the plaintiff's position can ossibly have supposed that a loan broker however wealthy would promise to pay out of his client's money 1½ lakhs of rupees except upon condition of some security eing obtained for the lender of the money. As between businessmen like plaintiff and defendant dealing with a tottering financier like Dwarkadas Dharamsey any arrangement for an unconditional guarantee such as the plaintiff now asserts

is incredible. It appears to us that the words 'I bind myself to you to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills and to pay you thereout' are correctly paraphrased in paragraph 5 of the defendant's written statement, where he says that all he had undertaken to do was to procure the lending of 11 lakhs if a first mortgage of the Mills was given and to pay thereout 1½ lakhs to the plaintiff.

"It was suggested by the plaintiff's counsel that if defendant had offered a written guarantee in these terms the plaintiff would never have advanced the money. We do not think that this would have been the result, for the plaintiff had no doubt of Dwarkadas Dharamsey's ability or willingness to mortgage the Mills. His only doubt was (as he himself says) whether Dwarkadas Dharamsey could induce anyone to lend him the 11 lakhs he wanted on the Mills. On the other hand, looking at the case from the point of view of the defendant, if he had been asked to promise repayment of the plaintiff's money, mortgage or no mortgage, security or no security, we cannot doubt that he would have refused.

"For these reasons we affirm the decree of the lower Court and dismiss the appeal with costs"

Leave to appeal to His Majesty in Council was granted by the High Court on the ground that the question of the construction of the letter of 7th August 1909 was a "substantial question of law" following the decision of COUCH, C. J., in *Nowbut Singh* v. *Chutter Dharee Singh*[1].

On this appeal,

Sir A. Cripps, K. C., and *G. R. Lowndes* for the appellants contended that upon the true construction of the letter of 7th August 1909 the respondent promised unconditionally to repay to the appellants the sum of Rs. 1,50,000 out of a loan of 11 lakhs to be procured by the respondent; that the promise to procure the loan of 11 lakhs ought to be construed as a promise to procure it effectually for the purpose in contemplation between the appellants and the respondent, which was the payment of the money advanced by the appellants. It was not a "contingent contract," and therefore section 32 of the Contract Act (IX of 1872) had, it was submitted, no application to it. There were no circumstances giving rise to an implied condition that Dwarkadas Dharamsey would take up the loan. The appellants did not know, as the respondent did, of the mortgage to Shivlal Motilal.

(1) (1873) 19 W. R. 222.

1912.

VISSANJI SONS & Co. v. SHAPURJI BURJORJI.

paid off in full, that the defendant had the 11 lakhs available for the loan which he undertook to procure, and was ready and willing to advance the said sum on a first mortgage of the Mills, that the undertaking to pay the sum of Rs. 1,50,000 out of the mortgage money contained in the letter of 7th August 1909 was conditional and contingent on the transaction of mortgage being given effect to and carried out by the loan being taken, and was not a promise unfettered by that condition, that the contingency failed in consequence of the act of Dwarkadas Dharamsey, that the fulfilment of the undertaking thereby became impossible, and that there was no breach on the part of the defendant of his contract, nor any liability on his part in respect of the sum claimed. The suit was consequently dismissed with costs.

On appeal by the plaintiffs the High Court in its Appellate Jurisdiction (Sir BASIL SCOTT, C. J., and BATCHELOR, J.) upheld the lower Court's decision.

The material portion of their judgment (after stating the facts) was as follows:—

"The above facts are undisputed. There is evidence that after the 9th August plaintiff tried to arrange for repayment out of the monies to be advanced by Shivlal on further charge and that he made no claim on defendant till 24th August, the day of the meeting of the creditors of Dwarkadas Dharamsey, when Shivlal had finally decided not to advance the remaining 3 lakhs.

"In the view we take of the case however what happened after the 9th of August is of no importance for the purpose of our decision. The question which we have to decide is what requisition the plaintiff laid before the defendant by the draft and what the defendant undertook by the letter of the 7th August.

"The plaintiff's present case is that he insisted on a request from the defendant for an advance of Rs. 1½ lakhs to Dwarkadas Dharamsey and the defendant's promise that he would repay that amount. If this was what he wanted it is strange that he did not ask for a bare and absolute guarantee from the defendant instead of introducing an unnecessary reference to the first mortgage of the Tricumdas Mills.

"It appears to us that no reasonable businessman in the plaintiff's position can possibly have supposed that a loan broker however wealthy would promise to pay out of his client's money 1½ lakhs of rupees except upon condition of some security being obtained for the lender of the money. As between businessmen like plaintiff and defendant dealing with a tottering financier like Dwarkadas Dharamsey any arrangement for an unconditional guarantee such as the plaintiff now asserts

LORD MACNAGHTEN :—The question in this case turns simply upon the construction of a very short document. It is addressed to the appellants, and is in these words :—" In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills a sum of Rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of Rupees eleven lakhs on the first mortgage of the Mills' block property, and to pay to you thereout the said sum of Rupees one lakh and fifty thousand agreed to be advanced by you to the Mills "

Everybody is now agreed that what took place after the execution of that document can have no bearing on the construction of it All that the admitted evidence shows is that the appellants wanted some real and substantial security for their advance. They advanced the lakh and a half, and the only question is, what is the meaning of this guarantee? Does it mean that all that the respondent undertook was that he would find somebody willing to lend eleven lakhs on a first mortgage of the Mills and that he was to do nothing further except, if that arrangement was carried through, he would pay to the appellant out of the loan a lakh and a half?

Various constructions have been suggested. The one which Sir Robert Finlay, for the respondent, finally adopted is the one on which the Judges in the Appeal Court relied. They say they agree with the respondent when he says " that all he had undertaken to do was to procure the lending of eleven lakhs if a first mortgage of the Mills was given, and to pay thereout Rupees $1\frac{1}{2}$ lakhs to the plaintiff "

Their Lordships read the document not in that sense at all, but as a substantial undertaking that a loan should be procured, and that out of that loan this sum of Rs. 1,50,000 should be repaid.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that a decree should be

1912

VISSANJI SONS & Co. v. SHAPURJI BURJORJI.

made in favour of the appellants. Of course the respondents will pay the costs of this appeal, and the costs below.

Solicitors for the appellants : *Messrs. Latteys & Hart.*

Solicitors for the respondents : *Messrs. T. L. Wilson & Co.*

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *August 22.*

MADONJI DEVCHAND AND OTHERS, APPELLANTS AND PLAINTIFFS, *v.* TRIBHOWAN VIRCHAND AND ANOTHER, RESPONDENTS AND DEFENDANTS.*

Indian Trusts Act (II of 1882), section 5—Trust declared outside British India—Proceedings in British Indian Courts—Redeemed mortgagee retaining mortgaged share as trustee for mortgagor—Notice of assignment by mortgagor—Death of mortgagor before registration of transfer to assignee—Validity of trust—Completion of gift.

N, through her agent T, mortgaged a share in the Bank of Bombay with P. Later she directed T to redeem it and have it transferred by way of gift to her two nephews. It was redeemed and a transfer form was signed by P in favour of the nephews, but the Bank declined to register it on the ground that the transferees were minors. N thereupon directed that it should be transferred to the names of T and M jointly as trustees for the minors. A transfer was accordingly signed by P in favour of T and M, and this was duly registered by the Bank. The day before it was lodged with the Bank for registration, N died.

It was contended that the gift was imperfect and the trust in favour of the nephews invalid.

Held, that as the trust was set up in a British Indian Court the Indian Trusts Act applied, although both N and P were living and domiciled in Kathiawar (*i.e.*, outside British India) when N declared her wishes regarding the share.

Held, further, that N had an equitable interest in the share and that, the mortgage having been discharged, P, the registered proprietor, held the legal title as trustee and was bound to deal with it as T or his principal N should direct.

Held, further, that the share had passed out of the control of N before her death, the certificate as well as the transfer being in the hands or under the control of T, to whom her desire to benefit the minors had been communicated, and that the legal holder P, having notice and having signed a transfer in favour of the

* Appeal No. 3 of 1911 ; Suit No. 847 of 1907.

minors before N's death, could only convey for their benefit, and had subsequently done so to the trustees desired by N.

Held, therefore, that the trust was valid and the gift complete.

ON 18th November 1892 one Ruttonji Shamji, a Dassa Shrimali Hindu, died at Mangrole, a Native State in Kathiawar, leaving him surviving two widows, Monghibai and Nandoobai. At the time of his death there stood in his name (*inter alia*) four shares in the Bank of Bombay and two shares in the Manockji Petit Manufacturing Company. On 16th August 1893 Monghibai died, and litigation ensued between the executors of her will and Nandoobai with reference to the share of Monghibai in the property left by Ruttonji Shamji A settlement was eventually reached, however, Nandoobai agreeing to pay the executors the sum of Rs. 10,251 in full satisfaction of their claim.

On the application of Nandoobai a will made by Ruttonji Shamji the day before his death was declared inoperative by the Mangrole Court on the ground of unsoundness of mind, and letters of administration were granted to Nandoobai. Letters of administration to the property and credits of Ruttonji Shamji in Bombay were similarly granted by the Bombay High Court to Nandoobai's brother, Tribhowan, whom she had appointed her attorney in that behalf.

On 15th June 1900, Tribhowan, in order to pay off the executors of Monghibai, borrowed Rs. 4,000 from one Morarji Jootha and transferred the four Bank of Bombay shares above mentioned into the name of Morarji's wife Premcorebai by way of security for the loan. On 19th September 1902 three of the Bank shares were sold and the proceeds paid over to Premcorebai in repayment of the advance by Morarji, who had since died The one share still remaining in the name of Premcorebai was intended by Nandoobai to be given to her two nephews Pranlal and Keshavlal Premcorebai, therefore, executed a transfer in their favour, but the Bank declined to register it on the ground that the transferees were minors. Nandoobai then directed that the share should be transferred into the names of her brothers Tribhowan and Motichand, the

1911.

MADONJI DEVCHAND v. TRIBHOWAN VIRCHAND.

1st and 2nd defendants, jointly as trustees for the minors. Premcorebai accordingly executed a fresh transfer which was lodged with the Bank on 15th December 1902 and duly registered. On 14th December 1902, however, Nandoobai died. Previous to her death she had transferred to her brothers Tribhowan and Motichand the two shares in the Manockji Petit Manufacturing Company standing in Ruttonji Shamji's name.

The plaintiffs filed this suit in 1907 claiming as reversionary heirs (along with the 3rd, 4th and 5th defendants, who refused to join as plaintiffs) to recover the property of Ruttonji Shamji.

The suit was tried by Davar, J., and was dismissed on the grounds recapitulated in the judgment of the Appeal Court printed below

The plaintiffs appealed.

Shortt, with *Desai*, appeared for the appellants

Jinnah, with *Bahadurji*, appeared for the respondents.

SCOTT, C J. :—The plaintiffs as heirs of Ruttonji Shamji prayed for a declaration that two shares in the Manockji Petit Spinning and Weaving Company and four shares in the Bank of Bombay standing in the name of the 1st and 2nd defendants belonged to and formed part of the estate of Ruttonji Shamji and that the plaintiffs and the 5th defendant (and two other defendants now deceased) were the absolute owners thereof and of all dividends accrued due thereon and for consequential relief by transfer of the shares and payment of the dividends.

Ruttonji Shamji was a Dassa Shrimali Bania of the Jain religion domiciled at Mangrole in Kathiawar who died without issue and possessed of considerable property on the 18th of November 1892 leaving two widows Monghibai and Nandoobai. Monghibai died on the 16th of August 1893 leaving a will whereof she appointed executors. After her death litigation was commenced by the executors claiming from Nandoobai part of the property left by Ruttonji Shamji as belonging to Monghibai's estate. Eventually a settlement was arrived at

whereby Nandoobai agreed to pay to Monghibai's executors the sum of Rs. 10,251 in respect of the share of Monghibai in Ruttonji's estate in three instalments For the purpose of paying the last instalment Nandoobai who resided at Mangrole appointed her brother Tribhowan, the 1st defendant, her attorney to obtain from the High Court in Bombay letters of administration to the estate of Ruttonji to enable him to raise money upon mortgage of four shares in the Bank of Bombay standing in Ruttonji's name Letters of administration were obtained by Tribhowan accordingly and the four shares were transferred by him by way of mortgage to Premcorebai, the wife of Morarji Jootha, as security for a loan of Rs. 4,000.

Shortly before her death which occurred on the 14th of December 1902, Nandoobai made a gift of two shares in the Manockji Petit Company standing in Ruttonji's name to her brothers the 1st and 2nd defendants and the same were duly transferred to their names in the books of the Company. A little later she arranged for the payment of the debt secured by the Bank of Bombay shares Three of the shares were sold and the proceeds paid to the mortgagee and the certificate for the remaining share was handed back to an agent of Tribhowan, the 1st defendant, on payment of a small balance which still remained due Nandoobai had given instructions to Tribhowan to get the remaining share transferred into the names of her sister's two sons for their benefit. The intended beneficiaries were, however, minors and although Premcorebai executed a transfer form in their favour on the 1st of December 1902 it was found that the Bank would not accept it for registration on account of the incompetence of the transferees. To get over the difficulty Nandoobai then directed that the share should be transferred to the names of the 1st and 2nd defendants on behalf of the minors

Accordingly the names of the 1st and 2nd defendants were substituted as transferees and the transfer was lodged for registration on the 15th of December 1902. The transfer was then duly registered in the names of the defendants 1 and 2. Meanwhile Nandoobai had died on the 14th of December 1902. None of these facts are now disputed.

1911.

MADONJI DEVCHAND v. TRIBHOWAN VIRCHAND.

The issues raised in the lower Court on the pleadings were :—

(1) Whether Ruttonji Shamji was not a Jain?

(2) Whether according to custom and usage obtaining in the Jain community Nandoobai and Monghibai, the widows of the said Ruttonji Shamji, did not become absolutely entitled to the whole of the property of their deceased husband?

(3) Whether the said deceased Nandoobai did not make a gift of the two shares in Manockji Petit Spinning and Weaving Company to each of the first two defendants as in para. 6 of the written statement alleged?

(4) Whether the said Nandoobai did not give one share in the Bank of Bombay to her sister Moolibai's sons by way of gift, as alleged in para. 6 of the written statement?

(5) Whether the plaintiffs and defendant 5 are the next reversioners of the property and effects of the said Ruttonji Shamji on the death of his widow Nandoobai?

(6) Whether the gifts of the shares referred to in issues 3 and 4 are not valid gifts?

(7) General issue.

At the first hearing issues 1 and 5 were found by *consent* in the affirmative, and the learned Judge upon the evidence held on issue 2 that Nandoobai and Monghibai according to the custom of the Jain community of Mangrole and Uplata on the death of their husband became absolutely entitled to the properties left by him, on issue 3 that Nandoobai did during her lifetime make a gift of one share in the Manockji Petit Mills to each of her brothers, the 1st and 2nd defendants, on the 4th issue that Nandoobai during her lifetime made a gift of one share in the Bank of Bombay for the benefit of her sister's sons and on the 6th issue that Nandoobai was entitled to make the gifts and that they were valid.

Upon these findings the suit was dismissed

On appeal the plaintiffs' counsel has not contested the validity of the gift of the Manockji Petit shares to the defendants 1 and 2, except on the ground of undue influence, a ground of objection which we declined to allow as it was not raised in the lower Court. The plaintiffs' counsel then confined himself to the question of the validity of the disposition of the share in the Bank of Bombay in favour of the nephews of Nandoobai. The issues relating to this share were tried in the

lower Court without bringing the beneficiaries on the record upon the assumption, we presume, that the defendants 1 and 2 held in trust for them. That position was, however, abandoned in argument before us, for it was contended that there was an invalid trust as well as an imperfect gift. Under these circumstances if we had any doubt as to the propriety of affirming the decision of the lower Court it might be necessary to add the nephews of Nandoobai as parties and to remand the case for retrial as to their interest in the share in the Bank of Bombay. We are of opinion, however, that the plaintiffs' contention must fail. The evidence recorded fully establishes the custom whereby the widows of Ruttonji became absolutely entitled to his property and we have nothing to add to the judgment of the lower Court upon this question. If the widows were absolutely entitled it is difficult to see how the plaintiffs can claim the property left by Nandoobai in preference to her brothers, but a complication is introduced by the finding by consent on the 5th issue to the effect that the plaintiffs and defendant 5 are the next reversioners of the property and effects of Ruttonji on the death of Nandoobai

The evidence recorded establishes the testamentary power of the widow but does not deal specifically with the question whether, failing a disposition by the widow of the property of the deceased husband either *inter vivos* or by will, it will go to the heirs of the widow or to the heirs of the husband.

Assuming for the purpose of argument that the plaintiffs have a reversionary interest in preference to the 1st and 2nd defendants, it can only be in property left undisposed of by the widow and we are of opinion that Nandoobai effectually disposed of her interest in the share in the Bank of Bombay.

Nandoobai had an equitable interest in the share although the legal holder was the registered proprietor Premcorebai. The mortgage having been discharged Premcorebai held the legal title as trustee for her transferor Tribhowan and was bound to deal with it as he or his principal Nandoobai should direct. Premcorebai's son, Jamnadas Morarji, the active member of the mortgagee's family, says that on payment of the

1911.

LADONJI
CVCHAND
v.
TRIBHOWAN
CHAND

balance due on the security of the share, the transfer which Tribhowan had in his possession was signed by Premcorebai at Jamnadas' request and was sent along with a letter to the mortgagee's moonim Nathu Kalliauji at Bombay instructing him to hand over the share and the transfer to the man appointed by Tribhowan. Jamnadas also deposes to a conversation with Champsey, the father of the boys, from which he gathered that the transfer was to effectuate a gift by Nandoobai to her nephews This would also be brought to the notice of Jamnadas and Premcorebai by the fact that on the transfer as originally made out the transferees were the nephews of Nandoobai. In further proof of the transfer by Nandoobai of her beneficial interest in the share of her nephews is the fact that Tribhowan who was managing her affairs transmitted her instructions to get the share transferred into the boys' names to the broker Tarachand Walji and that, according to Champsey, the boys' father, Nandoobai told him that she was giving the share to his sons and also that the broker in Bombay had informed her that the share could not be transferred to the minors' names so she said it would be transferred to her brothers' names and they would hold it for Champsey's sons. As the certificate as well as the transfer was then in the hands or under the control of Tribhowan to whom her desire to benefit the minors had been communicated, it is difficult to see what more Nandoobai could have done to divest herself of her equitable interest in favour of her nephews.

It is contended for the appellants that as Nandoobai died on the 14th of December, the day before the transfer to the defendants 1 and 2 was lodged for registration with the Bank and while the share still stood in the name of Premcorebai, no gift was completed and no trust was created Reliance is placed upon section 5 of the Indian Trusts Act which provides that no trust in relation to moveable property is valid unless declared in writing signed by the author of the trust or unless the ownership of the property is transferred to the trustee Although Nandoobai and Premcorebai both were living and domiciled at Mangrole in Kathiawar when Nandoobai declared her

wishes regarding the share, it does not follow that the 5th section of the Indian Trusts Act will not apply to the defendants setting up a trust by Nandoobai in a British Indian Court. In *Rochefoucauld* v. *Boustead*[1] Lord Justice Lindley said: "Counsel for the plaintiff contended that the Statute of Frauds had no application to lands in Ceylon. But, having regard to *Leroux* v. *Brown*[2], and to the language of section 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this. it regulates procedure here, not titles to land in other countries."

How far are these remarks applicable to section 5 of the Indian Trusts Act, which says, "no trust is valid unless"? The effect of similar words in the English Stamp Act which provides that "a Sea Policy shall not be valid unless" was discussed in *Royal Exchange Assurance Corporation* v *Sjorforsakrings Aktiebolaget Vega*[3]. Bigham, J, said: "Even assuming that the policy is to be interpreted with reference to Swedish law, I should still be of opinion that it could not be admitted in evidence. The statute makes such a contract invalid. That means no more than that it is a contract which cannot be put in suit. It is not illegal or immoral. The case, therefore, falls within the authority of *Leroux* v. *Brown*[2]. The document is shut out because it would be contrary to our procedure to admit it."

We, therefore, think that section 5 of the Indian Trusts Act is applicable to this case. It is clear that there is no written and signed declaration of trust by Nandoobai, but on the other hand the property was already vested in a trustee, namely, Premcorebai. The facts appear to us to bring this case within a class of cases consistent with the provisions of section 5 of

(1) [1897] 1 Ch. 196 at p. 207. (2) (1852) 12 C B. 801.
(3) [1901] 2 K. B. 567 at p. 575.

1911.

MADONJI DEVCHAND v. TRIBHOWAN VIRCHAND.

the Indian Trusts Act described by Lord Romilly in *Bridge* v. *Bridge*[1] as follows:—

"If the stock stood in the names of trustees, and the beneficial owner of it executed, in favour of a volunteer, an assignment of such stock, and if notice of that assignment were given to the trustees, who acknowledged the validity of it and acted upon it, they would thereupon, through the act of the beneficial owner, become the trustees for the volunteer, and equity would enforce the due performance of that trust in his favour."

The cases referred to in this passage are not confined to cases of written assignments by the beneficial owner, for example, in *M'Fadden* v. *Jenkyns*[2], a verbal message to a debtor desiring him to hold the debt in trust for another, when the trust was accepted by the debtor and communicated to the *cestui que trust* was held to create a trust binding upon the personal representatives of the creditor Here it has not been argued that Chapter VIII of the Transfer of Property Act is applicable. In some cases the fact that a settlement is intended and is not executed is sufficient to defeat the intended trust as in *Coningham* v. *Plunkett*[3], but in the present case Nandoobai never intended to take any further step than she did take.

We, therefore, hold that the share had passed out of the control of Nandoobai before her death and that the legal holder Premcorebai having notice and having signed a transfer on the 1st of December in favour of the minors could only convey for their benefit. This she did subsequently to the trustees desired by Nandoobai.

Assuming, therefore, that any property left undisposed of by Nandoobai at her death would devolve on her husband's heirs we hold that the share in the Bank of Bombay does not fall within this category.

We dismiss the appeal with costs.

Attorneys for the appellants: *Messrs. Mulji & Khambata.*

Attorneys for the respondents: *Messrs. Captain & Vaidya.*

Appeal dismissed.

K. McI. K.

(1) (1852) 16 Beav. 315 at p. 322. (2) (1842) 1 Ph. 153.
(3) (1843) 2 Y. & C. (Ch.) 245.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY AND ANOTHER (APPELLANTS AND DEFENDANTS) *v.* MUNCHERJI PESTONJI CHOKSEY (RESPONDENT AND PLAINTIFF) * 1911. *August 3*

The City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Act V of 1905), section 297 (1) (b)†—Powers of the Municipal Commissioner to prescribe a fresh line on either side of a street in substitution for any line previously prescribed by him—Power to prescribe a line of the street with the view to widening the street, sections 297-301—Significance of heading to clauses.

In 1903 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888). No record was kept of the said line.

---

* Suit No. 2 of 1910; Appeal No. 13 of 1911.

† Section 297 of the City of Bombay Municipal Act III of 1888 as amended by Bom. Act V of 1905 runs as follows —

Section 297. (1) The Commissioner may—

(a) prescribe a line on each side of any public street;

(b) from time to time, but subject in each case to his receiving the authority of the Corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof, provided that such authority shall not be accorded—

(i) unless, at least one month before the meeting of the Corporation at which the matter is decided, public notice of the proposal has been given by the Commissioner by advertisement in local newspapers as well as in the *Bombay Government Gazette*, and special notice thereof, signed by the Commissioner, has also been put up in the street or part of the street for which such fresh line is proposed to be prescribed, and

(ii) until the Corporation have considered all objections to the said proposal made in writing and delivered at the office of the Municipal Secretary not less than three clear days before the day of such meeting.

(2) The line for the time being prescribed shall be called "the regular line of the street."

(3) No person shall construct any portion of any building within the regular line of the street except with the written permission of the Commissioner, who shall, in every case in which he gives such permission, at the same time report his reasons in writing to the standing committee.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

In 1909, in ignorance of the said line previously prescribed, the Municipal Commissioner prescribed a fresh line for the same street, without obtaining authority from the Corporation, and entered upon the land of the plaintiff which lay within the said fresh line. Subsequently, having been informed of the previous line, the Commissioner obtained authority to prescribe a fresh line as previously irregularly prescribed and subsequently again entered on the part of the plaintiff's land within that line.

Both the said line prescribed in 1903 and the subsequent line prescribed in 1909 were prescribed for the purpose of widening the said street for the purpose of enabling an overbridge to be built on it.

The plaintiff contended that, as the object of the Commissioner in prescribing the line of the street in both cases was to widen the street, his action was illegal and that the lines prescribed were not made the regular lines of the street. *Further*, that in any event the Commissioner should be ordered to take up the plaintiff's land and pay for it up to the line prescribed in 1903, the only legal line of the street at the date when the Commissioner first entered the plaintiff's land.

Held, that subject to the provisions of section 297 of the Municipal Act the Commissioner might prescribe a line of a street, whether in substitution for a previous line or not, and that his action would not be invalid merely because it had for its object the widening of the street. *Held* also that the headings of clauses are not to be relied on.

Held, further, that *Essa Jacob* v. *Municipal Commissioner of Bombay*(1) is no longer an authority since the amendment of the Act in 1905.

THE plaintiff was the owner of a house and compound on the north side of Elphinstone Road. In 1902 it was decided by the Corporation to build an overbridge over the G. I. P. and B. B. & C I Railways where the same are crossed by Elphinstone Road and with that purpose to widen that road. The Municipal Commissioner therefore on the 4th of March 1903 under section 297 of the Municipal Act as then in force prescribed a regular line on the north side of the said street about 50 feet distant from the existing north side of that street. Owing to an oversight, however, this line was not recorded in the Municipal office and was lost sight of. On the 19th of March 1909 the Commissioner, who was not aware of the regular line prescribed in 1903, purported to prescribe a regular line on the north side of the said street at the distance of about 20 feet only from the existing north side of the street. The Commissioner issued notices to the various owners part of whose property lay within the line so prescribed

(1) (1900) 25 Bom. 107.

including the plaintiff and afterwards took possession of so much of the plaintiff's compound as lay within the said line. Subsequently the attention of the Commissioner was drawn to the line previously precribed in 1903.

On the 4th of November 1909 the Commissioner having then received authority as required by section 297 (1) (*b*) of the Municipal Act prescribed a fresh regular line of the street in the same position as that previously irregularly prescribed by him in March 1909 and a fresh notice was served on the plaintiff under sections 299 and 488 of the Municipal Act and possession was again formally taken of the plaintiff's land within the regular line of the street as so prescribed.

The plaintiff sued the Commissioner and the Corporation of Bombay for recovery of the said land and other relief. The plaintiff contended that as the object of the Commissioner in prescribing the said lines of the street was to widen the said street to facilitate the construction of an overbridge the prescribing of the said line was *ultra vires* of the Commissioner and that the said lines did not become the regular lines of the street.

The lower Court held that it was bound by the decision given in *Essa Jacob* v. *Municipal Commissioner of Bombay*[1] passed before the amendment of the Municipal Act in 1905, that the object of section 297 was not to enable the Commissioner to widen a public street, and accordingly gave judgment for the plaintiff.

The defendants appealed.

Strangman (Advocate General), with him *Jardine* and *Setalvad*, for the defendants and appellants.

Tarapurwalla with *Desai* for the plaintiffs and respondents relied on the judgment of *Essa Jacob* v. *Municipal Commissioner of Bombay*[1] and referred to the heading to the clauses 297 to 301 "Preservation of regular line in public streets" to show the intention of section 297 (1) (*b*).

SCOTT, C. J.:—The plaintiff is the owner of a house and compound abutting on Elphinstone Road near the point

(1) (1900) 25 Bom. 107.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* MUNCHERJI PESTONJI.

where it is intersected by two lines of Railway. In 1902 it was decided that an overbridge should be built carrying the Elphinstone Road over the railways. On the 4th of March 1903 the then Municipal Commissioner Mr. Harvey, in order to provide for the changed conditions which would result from the building of the overbridge, prescribed on the northern side of the Elphinstone Road a line as the regular line of the street, purporting to act under the power conferred by section 297 of the City of Bombay Municipal Act, 1888, which ran as follows: "The Commissioner shall prescribe a line on each side of any public street within which except under the provisions of section 310 no portion of any building abutting on the said street shall after such line has been prescribed be constructed."

The line so prescribed was not recorded on the usual plan in the Municipal office and was not generally known.

In 1909 the Railway Companies proposed alterations in the position of the overbridge which even then had not been commenced. In consequence of those proposals the then Municipal Commissioner Mr. Sheppard prescribed a line on each side of the road. The northern line so prescribed lay to the south of that prescribed by Mr. Harvey. Some time later in the year it was discovered that Mr. Harvey had prescribed a regular line and accordingly steps were taken in conformity with section 297 as amended by Bombay Act V of 1905 to legalise the substitution of the new line by following the procedure specified in section 297 (1) (*b*). When everything was in order formal possession of such part of the plaintiff's compound as lay within the new line was taken under section 299.

That section provides that if any land not vesting in the Corporation whether open or enclosed lies within the regular line of the street and is not occupied by a building the Court may take possession on behalf of the Corporations and clear the same and the land so acquired shall thenceforward be deemed a part of the street. The power of the Commissioner to prescribe a line enables him (*a*) to prescribe a line on each side of any public street, (*b*) from time to time, with the special authority of the Corporation, to prescribe a fresh line in sub-

stitution for any line so prescribed or for any part thereof. The action of the Commissioner therefore, in taking possession of the plaintiff's land falls within the words of sections 297 and 299. It is, however, challenged by the plaintiff on the ground that the plain words of section 297 are controlled by the heading prefixed to the fasciculus of sections 297 to 301. The words of the heading are "Preservation of regular line in public streets." It is contended that although a regular line may be substituted from time to time for the old line, it will be vitiated by illegality of the motive for the substitution if that motive is not simply preservation of a regular line but the securing of a wider street. The argument is based upon a passage in the judgment of Sir Lawrence Jenkins in *Essa Jacob* v. *Municipal Commissioner of Bombay*[1], a case decided in 1900 on appeal from a decision of Mr. Justice Crowe. The sole point in the case was, as is apparent from the pleadings and the explicit statements of Mr. Justice Crowe and the Judges of the appellate Court, whether after a regular line had once been prescribed by the Commissioner it could subsequently be altered by the prescription of a fresh line Mr. Justice Crowe thought it was open to the Commissioner if the exigencies of traffic so required to widen the street by setting back the prescribed line. This liberal construction of the Commissioner's powers under the unamended section 297 was dissented from by the appellate Court. Sir Lawrence Jenkins referred to the sections 289 and 296 which expressly conferred upon the Commissioner power to widen streets subject to certain restrictions and he drew the conclusion from those sections and the heading of the group of sections that the prescription of a regular line was the object of section 297 and not the widening of the street and that, therefore, the liberal construction of the lower Court was not called for. The Chief Justice then deals with the argument that the action of the Commissioner should not be interfered with merely because it might indirectly have a result for the attainment of which other provision was made; the answer of the Chief Justice was that the argument overlooked the admissions, from which it

(1) (1900) 25 Bom. 107 at p. 110.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

where it is intersected by two lines of Railway. In 1902 it was decided that an overbridge should be built carrying the Elphinstone Road over the railways. On the 4th of March 1903 the then Municipal Commissioner Mr. Harvey, in order to provide for the changed conditions which would result from the building of the overbridge, prescribed on the northern side of the Elphinstone Road a line as the regular line of the street, purporting to act under the power conferred by section 297 of the City of Bombay Municipal Act, 1888, which ran as follows: "The Commissioner shall prescribe a line on each side of any public street within which except under the provisions of section 310 no portion of any building abutting on the said street shall after such line has been prescribed be constructed."

The line so prescribed was not recorded on the usual plan in the Municipal office and was not generally known.

In 1909 the Railway Companies proposed alterations in the position of the overbridge which even then had not been commenced. In consequence of those proposals the then Municipal Commissioner Mr. Sheppard prescribed a line on each side of the road. The northern line so prescribed lay to the south of that prescribed by Mr. Harvey. Some time later in the year it was discovered that Mr. Harvey had prescribed a regular line and accordingly steps were taken in conformity with section 297 as amended by Bombay Act V of 1905 to legalise the substitution of the new line by following the procedure specified in section 297 (1) (*b*). When everything was in order formal possession of such part of the plaintiff's compound as lay within the new line was taken under section 299.

That section provides that if any land not vesting in the Corporation whether open or enclosed lies within the regular line of the street and is not occupied by a building the Court may take possession on behalf of the Corporations and clear the same and the land so acquired shall thenceforward be deemed a part of the street. The power of the Commissioner to prescribe a line enables him (*a*) to prescribe a line on each side of any public street, (*b*) from time to time, with the special authority of the Corporation, to prescribe a fresh line in sub-

heading of the clauses": see *Hammersmith, &c., Railway Co.* v. *Brand*[1].

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

We vary the decree of the lower Court by deleting the prayer for possession and decreeing that the plaintiff do pay the costs throughout.

BATCHELOR, J. :—In this suit the plaintiff complained of the action of the Municipal Commissioner, who, purporting to act under section 299 of the City of Bombay Municipal Act, 1888, took possession, on behalf of the Corporation, of certain open land belonging to the plaintiff. As stated in the notice served on the plaintiff, Ex. A to the plaint, this action of the Commissioner was based upon the ground that the land in question was within the regular line of the public street, as that line had been prescribed by the Commissioner under section 297 of the Municipal Act of 1888, as amended by the City of Bombay Municipal (Amendment) Act, 1905. The question in controversy between the parties is whether the Commissioner was competent under section 297 to prescribe the line within which the land in suit falls: if he had that power, then it would follow under section 299 that in the circumstances of this case he was entitled to take possession of the land. I propose to limit myself to the consideration of this question, and, with that object, I pass unnoticed certain independent matters which were disputed before the lower Court but are not disputed before us.

The sole question in this Court is whether, under the amended section 297 of the Act, the Commissioner has power to prescribe what is called in the Act "the regular line of the street" when he affects to prescribe such a line for the purpose of merely widening an existing street. The learned trial Judge has answered this question in the negative, being of opinion that the case fell within the decision of this Court in *Essa Jacob* v. *Municipal Commissioner of Bombay*[2]. That was a decision of 1900, and the amendment of section 297 was made by an Act of 1905, but Mr. Justice Robertson came to the conclusion that, so far as the present question is concerned, the

(1) (1869) L. R. 4 H. L. 171 at p. 217. (2) (1900) 25 Bom. 107.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

amendment of the section leaves the appellate Court's decision unaffected. The real question in this appeal is whether this conclusion of the learned Judge is the right conclusion, and, to answer it, it is necessary to see what *Essa Jacob's* case[1] decided and what was effected by the subsequent amendment of the section.

In *Essa Jacob's* case the Commissioner had prescribed *one* line shortly after the passing of the Act of 1888, and Jenkins, C. J., observes that "the only question is, whether it was open to the Commissioner to prescribe a different line in 1893, setting back the regular line of his predecessor." This point is made still clearer on reference to the pleadings, which are quoted in the report. The plaintiff's case was "that, under the provisions of section 297 of the City of Bombay Municipal Act, a line can only once be prescribed as the regular line of the street, and that it is not competent for the Municipal Commissioner from time to time to alter the lines once prescribed." The Municipal Commissioner, on the other hand, contended that his action in prescribing the later line was within his powers, he "having determined that it would be for the public interest to have the said street widened to a width greater" than that prescribed by the earlier line. The question between the parties, therefore, was clearly this: the Commissioner having once prescribed a line under section 297, was it competent to him to prescribe a different line later? The Court answered this question in the negative, and the leading judgment was delivered by Jenkins, C J. It is upon the terms of this judgment that the respondent places his main reliance, but I think that, if the judgment be read carefully in the light of the pleadings and the issue, it will be recognized that the subsequent amendment of the section deprives the decision of any present authority and is fatal to the respondent's contention.

The Chief Justice begins his judgment by noticing two separate groups of sections, those dealing with "the construction, maintenance and improvement of public streets," and those dealing with the "preservation of regular line in public streets." After observing that section 297 falls within this

(1) (1900) 25 Bom. 107.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

latter group, he points out that the purpose of setting back the regular line of the street was to widen it, not to preserve the regular line of that street for, he says, "that *ex concessis* was already secured by the line which in 1888 was prescribed by the Commissioner under section 297." Then follows the passage in which it is stated that the purpose of section 297 is not to enable the Commissioner to widen a public street; and this passage, as I understand it, is the answer to the Commissioner's plea that he was empowered to prescribe the second line by reason of his determination that it would be for the public good to widen the street beyond the limit of the earlier line That this is the meaning of the passage appears clear from the concluding words · the purpose of the section, says Sir Lawrence Jenkins, is not to empower the Commissioner to widen the street, but is "to empower him to secure a regular line of street, an end already secured by the line prescribed in 1888." So in the next following words, in dealing with Mr. Starling's argument that the Court should not interfere with the Commissioner's action under section 297 merely because it may indirectly have a result for the attainment of which other provision is made, the Chief Justice says: "This argument appears to me to overlook the admissions; for from them it logically follows that the conditions requiring and justifying the exercise of the power contained in section 297 have no existence." This plainly refers to the admissions that a line for the purpose of regularity had already been prescribed, and that the object of prescribing the new line was, not to attain regularity, but to widen the street. The judgment decides that this action was unauthorised, not because its motive was to widen the street, but because, the object aimed at by the section having already been secured by the first line, no second line could be prescribed, whatever might be the motive for the attempt to prescribe it.

Then comes the amendment, which is an addition to the section, and enacts that, with the authority of the Corporation, the Commissioner may "from time to time prescribe a fresh line in substitution for any line so prescribed or for any part thereof." This, it would seem, goes to the root of the earlier

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

decision, which allowed the then plaintiff's plea that "it is not competent to the Municipal Commissioner from time to time to alter the line so prescribed." In terms, therefore, unless there be some concealed difficulty, the amendment authorises precisely what has here been done with the authority of the Corporation, namely, the substitution of a fresh line for a line already prescribed What, then, is the difficulty suggested? It is that the Legislature has not altered the wording of the heading of this group of sections, "Preservation of regular line in public streets," nor has it expressly said that the prescription of the fresh line should be valid even though the object of it be to widen the street. But it has said generally that a fresh line may be prescribed from time to time, and this authority is not in any way limited by reference to the motive or the result with which it may be exercised; we cannot, therefore, read into the section a limitation or restriction which the Legislature has not imposed. As to the phraseology of the heading of the sections, it is plain that that cannot control the wording of section 297. The heading stands on the same footing as a preamble, and may be referred to for guidance if the meaning of the section is obscure: see *Eastern Counties, &c., Companies* v. *Marriage*[1] and the judgment of Collins, M. R., in *Fletcher* v. *Birkenhead Corporation*[2].

But in this case there is, I think, no obscurity in the section itself, and, if that is so, the appeal to the headings is beside the point. If fresh lines may from time to time be prescribed, it is certain that, at least in the great majority of cases, the effect of a new line will be to increase the width of the street in comparison with the earlier line, and a result so directly flowing from the amended section may be safely taken to have been contemplated and approved by the Legislature.

For these reasons I think that the decision in *Essa Jacob's* case[3] cannot, since the amendment of section 297, be regarded as authoritative, and that the Municipal Commissioner was empowered by the amended section to take the action of which

(1) (1860) 9 H. L. C. 32 at p. 41. (2) [1907] 1 K. B. 205

(3) (1900) 25 Bom. 107.

the plaintiff complains. I agree, therefore, that the appeal must be allowed.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

Attorneys for the plaintiff: *Messrs. Crawford, Brown & Co.*

Attorneys for the defendant. *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Appeal allowed.

H. S. C.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BAI LAXMI, PLAINTIFF, v HARJIVAN NATHU AND OTHERS, DEFENDANTS.*

1911. September 9.

Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1, and Order XXXIII, rule 1—Order for security for costs—Leave granted to continue suit as a pauper—Practice

An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired.

PROCEEDINGS in Chambers.

This was a suit filed by one Bai Laxmi on 12th April 1911 against the executors of the will of her deceased husband Jamnadas Vallabhdas, praying (*inter alia*) that the will should be declared void, and that the estate of the said Jamnadas should be administered by and under the directions of the Court.

On the 8th July an order was obtained that the plaintiff should within one month deposit Rs. 500 as security for the defendants' costs, and that in default the suit should be set down for dismissal. On 14th August, the plaintiff having failed to deposit security, the suit was set down for dismissal The plaintiff, however, applied for an extension of time, on the ground that she had filed an application on 31st July for leave to continue the suit as a pauper. An extension was granted, and within

* Suit No 311 of 1911.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

decision, which allowed the then plaintiff's plea that "it is not competent to the Municipal Commissioner from time to time to alter the line so prescribed." In terms, therefore, unless there be some concealed difficulty, the amendment authorises precisely what has here been done with the authority of the Corporation, namely, the substitution of a fresh line for a line already prescribed. What, then, is the difficulty suggested? It is that the Legislature has not altered the wording of the heading of this group of sections, "Preservation of regular line in public streets," nor has it expressly said that the prescription of the fresh line should be valid even though the object of it be to widen the street. But it has said generally that a fresh line may be prescribed from time to time, and this authority is not in any way limited by reference to the motive or the result with which it may be exercised; we cannot, therefore, read into the section a limitation or restriction which the Legislature has not imposed. As to the phraseology of the heading of the sections, it is plain that that cannot control the wording of section 297. The heading stands on the same footing as a preamble, and may be referred to for guidance if the meaning of the section is obscure: see *Eastern Counties, &c., Companies* v. *Marriage*[1] and the judgment of Collins, M. R., in *Fletcher* v. *Birkenhead Corporation*[2].

But in this case there is, I think, no obscurity in the section itself, and, if that is so, the appeal to the headings is beside the point. If fresh lines may from time to time be prescribed, it is certain that, at least in the great majority of cases, the effect of a new line will be to increase the width of the street in comparison with the earlier line, and a result so directly flowing from the amended section may be safely taken to have been contemplated and approved by the Legislature.

For these reasons I think that the decision in *Essa Jacob's* case[3] cannot, since the amendment of section 297, be regarded as authoritative, and that the Municipal Commissioner was empowered by the amended section to take the action of which

(1) (1860) 9 H. L. C. 32 at p. 41. (2) [1907] 1 K. B. 205
(3) (1900) 25 Bom. 107.

the plaintiff complains. I agree, therefore, that the appeal must be allowed.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

Attorneys for the plaintiff: *Messrs. Crawford, Brown & Co.*

Attorneys for the defendant: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Appeal allowed.

H. S. C.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BAI LAXMI, PLAINTIFF, v. HARJIVAN NATHU AND OTHERS, DEFENDANTS.*

1911. *September 9.*

Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1, and Order XXXIII, rule 1—Order for security for costs—Leave granted to continue suit as a pauper—Practice.

An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired.

PROCEEDINGS in Chambers.

This was a suit filed by one Bai Laxmi on 12th April 1911 against the executors of the will of her deceased husband Jamnadas Vallabhdas, praying (*inter alia*) that the will should be declared void, and that the estate of the said Jamnadas should be administered by and under the directions of the Court.

On the 8th July an order was obtained that the plaintiff should within one month deposit Rs. 500 as security for the defendants' costs, and that in default the suit should be set down for dismissal. On 14th August, the plaintiff having failed to deposit security, the suit was set down for dismissal. The plaintiff, however, applied for an extension of time, on the ground that she had filed an application on 31st July for leave to continue the suit as a pauper. An extension was granted, and within

* Suit No. 311 of 1911.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

decision, which allowed the then plaintiff's plea that "it is not competent to the Municipal Commissioner from time to time to alter the line so prescribed." In terms, therefore, unless there be some concealed difficulty, the amendment authorises precisely what has here been done with the authority of the Corporation, namely, the substitution of a fresh line for a line already prescribed. What, then, is the difficulty suggested? It is that the Legislature has not altered the wording of the heading of this group of sections, "Preservation of regular line in public streets," nor has it expressly said that the prescription of the fresh line should be valid even though the object of it be to widen the street. But it has said generally that a fresh line may be prescribed from time to time, and this authority is not in any way limited by reference to the motive or the result with which it may be exercised; we cannot, therefore, read into the section a limitation or restriction which the Legislature has not imposed. As to the phraseology of the heading of the sections, it is plain that that cannot control the wording of section 297. The heading stands on the same footing as a preamble, and may be referred to for guidance if the meaning of the section is obscure: see *Eastern Counties, &c., Companies* v. *Marriage*[1] and the judgment of Collins, M. R., in *Fletcher* v. *Birkenhead Corporation*[2].

But in this case there is, I think, no obscurity in the section itself, and, if that is so, the appeal to the headings is beside the point. If fresh lines may from time to time be prescribed, it is certain that, at least in the great majority of cases, the effect of a new line will be to increase the width of the street in comparison with the earlier line, and a result so directly flowing from the amended section may be safely taken to have been contemplated and approved by the Legislature.

For these reasons I think that the decision in *Essa Jacob's* case[3] cannot, since the amendment of section 297, be regarded as authoritative, and that the Municipal Commissioner was empowered by the amended section to take the action of which

(1) (1860) 9 H. L. C. 32 at p. 41. (2) [1907] 1 K. B. 205
(3) (1900) 25 Bom. 107.

1911.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. MUNCHERJI PESTONJI.

the plaintiff complains. I agree, therefore, that the appeal must be allowed.

Attorneys for the plaintiff: *Messrs. Crawford, Brown & Co.*

Attorneys for the defendant: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Appeal allowed.

H. S. C.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BAI LAXMI, PLAINTIFF, v. HARJIVAN NATHU AND OTHERS, DEFENDANTS.*

1911. *September*

Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1, and Order XXXIII, rule 1—Order for security for costs—Leave granted to continue suit as a pauper—Practice.

An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired.

PROCEEDINGS in Chambers.

This was a suit filed by one Bai Laxmi on 12th April 1911 against the executors of the will of her deceased husband Jamnadas Vallabhdas, praying (*inter alia*) that the will should be declared void, and that the estate of the said Jamnadas should be administered by and under the directions of the Court.

On the 8th July an order was obtained that the plaintiff should within one month deposit Rs. 500 as security for the defendants' costs, and that in default the suit should be set down for dismissal. On 14th August, the plaintiff having failed to deposit security, the suit was set down for dismissal. The plaintiff, however, applied for an extension of time, on the ground that she had filed an application on 31st July for leave to continue the suit as a pauper. An extension was granted, and within

* Suit No. 311 of 1911.

1911.

BAI LAXMI v. HARJIVAN NATHU.

obvious that, although the plaintiff has proved that he is not possessed of more than a hundred rupees, there would be a denial of justice, since the leave to sue as a pauper would not save him from having his suit dismissed under the order for giving security.

In my opinion, therefore, the order of the Prothonotary was rightly made and is confirmed.

The costs of this application will be costs in the cause.

Attorneys for the plaintiff. *Messrs Motichand & Devidas.*

Attorney for the defendants: *Mr. Thakoredas A. Gandhi.*

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Heaton.

1911. ...ember 18.

MOORJI MANECK, PLAINTIFF, v. PASSU PARBHAT AND OTHERS, DEFENDANTS.*

Bombay High Court Rules, rules 81, 321 and 323—Delegation of powers under rules 321 and 323 to the Prothonotary—Power of the Prothonotary to deal with applications to give short service of notice of motion.

The plaintiff filed a suit against the defendants claiming *inter alia* the appointment of an *interim* receiver and an *interim* injunction. The plaintiff obtained from the Prothonotary leave to give the defendants short notice of a motion in the said suit under rules 321 and 323 of the Bombay High Court Rules. The defendants objected that the Prothonotary had no power to shorten the time for notice.

Held that the Prothonotary had such power.

THE plaintiff filed a suit against the defendants claiming that a partnership between himself and the defendants should be dissolved and wound up, that necessary accounts should be taken, that the shares of the parties should be ascertained and paid to them, the appointment of an *interim* receiver and an *interim* injunction against the defendants, costs and other relief. The plaintiff gave the defendants notice of a motion for the appointment of an *interim* receiver and for an *interim* injunction as prayed for in the plaint. The plaintiff obtained

an order from the Prothonotary giving him leave to give the defendants short service of the said notice of motion under rules 321 and 323 of the Bombay High Court Rules.

The defendants claimed that such an order could only be made by a Judge under the terms of rules 81 and 321 of the Bombay High Court Rules.

Bahadurji for the plaintiff.

Setalwad for the defendants.

HEATON, J.:—Whatever my own personal view may be regarding the delegation of powers to the Prothonotary under rules 81 and 321 of the Bombay High Court Rules, I find that the practice in the Prothonotary's Office is that applications to issue short notice under rule 321 are made to and disposed of by him. From the enquiries I have made I have reason to suppose that this practice is based on a legal interpretation of these Rules; and I further have no doubt that the legal interpretation in favour of that practice is one which it is quite open to an authority to take, on the terms of the rules themselves. I am entirely new to the practice and procedure of this side of the Court and I am indisposed to act on a personal view of the interpretation of the Rules, which would interfere with the established practice. Therefore I hold that the notice of motion in this matter is not bad.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. *January 16.*

JIVAJI SAMBHAJI KAMBLI GAVKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* FAKIR SABAJI KAMBLI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Bombay Hereditary Offices Act (Bombay Act III of 1874), section 67†—Collector—Vatandars—Service Register—Suit for declaration as head of family—Civil Court—Jurisdiction.

The plaintiffs brought a suit to have it declared that they were entitled to a share of the vatan and to have their names recorded as such in the Service Register kept by the Collector.

Held, that the suit fell under the ban of clause (*d*) of section 67 of the Hereditary Offices Act (Bombay Act III of 1874) and was not cognizable by the Civil Court.

Govind Sitaram v. *Bapuji Mahadeo*(1) and *Balkrishna Chimnaji* v. *Balaji Ramchandra*(2), explained.

---

* Second Appeal No 12 of 1911.

† The section in question runs as follows :—

67. In the register of lands and allowances in consideration whereof liability to serve still exists, the Collector shall specify—

(*a*) the area of the lands, the names of the occupants, the survey number and assessment, the quit-rent, if any, leviable, and the nett revenue alienated by Government, the amount and nature of the cash or other allowances, the source from which they are payable, and the land and allowances assigned, for the remuneration of officiators ;

(*b*) the names of the heads of families and of the representative watandars ;

(*c*) whether the service is performed by one representative watandar or otherwise : if by several in successive periods, the order in which they are to succeed each other ;

(*d*) the proportional share of the watan possessed by each head of family which may be expressed in annas or fractions of a rupee ;

(*e*) the number of officiators required to perform the duties ;

(*f*) the nature of the settlement of inferior village watans referred to in Part X ; * * *

(*g*) such other particulars as Government may (from time to time) order to be recorded.

(1) (1893) 18 Bom. 516. (2) (1884) 9 Bom. 25.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Ratnagiri, confirming the decree passed by N. R. Majmundar, Subordinate Judge at Malvan.

Suit for declaration.

The *gaoki vatan* of the village of Rewandi belonged to the family of plaintiffs, defendants and their co-sharers. The *vatan* was held by the several branches of the family in turns. As holder of the office, they passed a *kabulayat* to Government every year, collected the land revenue of the village and paid it to Government who remunerated them by paying Rs. 20 a year. One of the branches of the family was headed by Sambhu Dhanaji Sambhu had three sons: Subaji (the father of defendants); Jivaji (plaintiff No 1) and Daji (father of plaintiffs Nos 2—5). As the defendants represented the eldest member in Sambhu's branch, their names were recorded in the Service Register kept by the Collector. Whenever it was Sambhu's turn to officiate, the defendants did the work and earned the fees to the exclusion of the plaintiffs. The plaintiffs therefore filed a suit to have it declared that they were entitled to a two-thirds share in Sambhaji's branch, to have the Government records corrected accordingly and to recover Rs. 20 as damages.

The defendant No. 1 contended *inter alia* that the suit was barred under the Hereditary Offices Act, 1874.

The lower Courts dismissed the suit on the ground that it was not maintainable by the Civil Courts.

The plaintiffs appealed to the High Court.

A. G. Desai, for the appellants:—We submit that the present suit which seeks a declaration that the plaintiffs are entitled to a share in the recognised share of their branch of the family, will lie in the Civil Courts. The Collector has authority only to determine who is the representative *vatandar*; but he has no authority to determine who is a *vatandar*. In other words, he is in no way concerned with the determination of the rights of the members of a particular branch *inter se*. Cases falling within the latter class can properly be tried by

1912.

JIVAJI SAMBHAJI v. FAKIR SABAJI.

Civil Courts. Refers to *Ramrao* v. *Secretary of State*[1]; *Govind Sitaram* v. *Bapuji Mahadeo*[2]; *Ramchandra Dabholkar* v. *Anant Sat Shenvi*[3]; *Rahimkhan* v. *Dadamiya*[4]; *Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni*[5]; *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji*[6]; *Balkrishna Chimnaji* v. *Balaji Ramchandra*[7] and *Raoji* v. *Genu*[8].

S. S. Patkar and *V. R. Sirur*, for the respondents, were not called upon.

CHANDAVARKAR, J.—The first question is, what is the relief which the plaintiff has asked for by his plaint in this suit and, secondly, whether that relief is barred by the provisions of the Vatan Act.

It is urged before us by Mr. Desai that the Civil Court has jurisdiction to entertain the suit, because what is asked by the plaintiff is not any relief which would be prohibited by section 67 of the Vatan Act, but a mere declaration that he is a member of Sambhu's branch, and that as such he has a two-thirds share in the Vatan belonging to that branch. We have had the plaint in the original read out to us and we have carefully considered its terms and its prayer. The summary of it as given by the Subordinate Judge in his judgment is substantially correct. In his plaint the plaintiff complains that he belongs to Sambhu's branch of the Vatan family; that Sambhu was the head of that branch so long as he was alive; that he dealt with the revenue authorities, executed *kabulayats* and owned a particular share, but that since Sambhu's death the defendant has been successfully posing as the head of the Vatan entitled to deal with the Collector and to pass *kabulayats*, and, therefore, entitled to be put upon the record under section 67 as the head of the branch. It is for the purpose of getting the defendant out of the way and having his own name recorded as the head of the branch in the Collector's

(1) (1896) P. J. 666.
(2) (1893) 18 Bom. 516
(3) (1883) 8 Bom. 25.
(4) (1909) 34 Bom. 101.
(5) (1877) 2 Bom. 370
(6) (1878) 2 Bom. 375.
(7) (1884) 9 Bom. 25.
(8) (1896) 22 Bom. 344.

Register that the suit has been brought. That is substantially the nature of the suit, and so it has been treated by both the Courts below. But Mr Desai relies in support of his argument on the decision of this Court in *Govind Sitaram* v. *Bapuji Mahadeo*(1) where Sargent, C. J., held that the duty of the Collector as determined by section 67 of the Vatan Act was confined to specifying the names of the heads of families and the proportionate part held by each head, but that he was in no way concerned with the rights of the members of a particular branch *inter se*. The meaning of that decision is that it is for the Collector, in the first instance, to determine who is the head of a particular branch of a Vatan family. Having determined that, it is also the sole function of the Collector under the Act to determine the proportionate part possessed by that head. But given the head and the proportionate part he possesses, as determined by the Collector in the exercise of his exclusive jurisdiction, the question what the rights of the members of that branch *inter se* are, with regard to their shares in the proportionate part so determined is a question which (according to the decision cited) lies within the province of a Civil Court. The judgment in *Govind Sitaram* v. *Bapuji Mahadeo*(1) would at first sight seem to be in conflict with a prior decision of this Court to which Sargent, C. J., was also a party, *viz.*, *Balkrishna Chimnaji* v. *Balaji Ramchandra*(2). But a close examination of both the cases satisfies us that there is no conflict. What the plaintiff in the latter case sought was a declaration of his share in the Vatan and of his title to have his name entered in the Vatan Register. That was under section 67. If he had asked merely for a declaration of his share in the Vatan without any reference to his title as the head of the family and the proportionate part which he possessed as such head, it would have been held that the suit lay. Sargent, C. J., pointed out in his judgment that it was true that the Court could not make a declaration of his right to a one-fourth share of the Vatan, without first determining whether he was the adopted son of Chimnaji; but that "the

1912.

JIVAJI SAMPHAJI v. FAKIR SABAJI.

declaration prayed for would be beyond the Court's jurisdiction." *That declaration related to the question of headship and the* share in respect of it. In the suit before us now, that is in substance the declaration prayed for.

For these reasons the decree must be confirmed with costs. There must be separate sets of costs.

BATCHELOR, J. :—I agree that this is a suit to obtain a declaration from the Civil Court to the effect that, the late head of the family, Sambhu, being now dead, the present head of the family is one of the plaintiffs and not one of the defendants; and that the plaintiffs are in consequence entitled to a proportional share of the Vatan. A suit of this character seems to me to fall directly under the ban of clause (*d*) of section 67 of the Hereditary Offices Act. The decision in *Govind Sitaram* v *Bapuji Mahadeo*[1] can be of no assistance to the present plaintiffs who are not suing as Vatandars for the adjustment of any dispute between themselves as to their distributive shares in a total portion awarded by the Collector to the head of the family.

I agree, therefore, that this suit is not competent.

Decree confirmed.

R. R.

(1) (1893) 18 Bom. 516.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1912. *January* 16.

BAI PARSON, WIDOW OF SELAT JIVRAM MAGANLAL, AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BAI SOMLI, WIDOW OF PRANSHANKAR MAGANLAL (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Mitakshara—Mayukha—Stridhan—Devolution—Daughter's sons take severally and not jointly—Coparcenary—Basic notion of coparcenary—Obstructed and unobstructed succession—Estate by partition—Estate by birth—Dayada—Rikhta—Interpretation—Self-acquired property.

Property inherited by sons from their mother is not a joint estate but a tenancy-in-common according to both the Vyavahara Mayukha and the Mitakshara.

* Second Appeal No 466 of 1911.

The basic principle of a joint tenancy or coparcenary under Hindu law explained.

A joint tenancy is property inherited as an unobstructed succession and is called *rikhta*. It devolves on the heirs as a coparcenary.

A tenancy-in-common is property inherited as an obstruction and is called *samavibhaga*, because when the inheritance falls in, it devolves on the heirs as a divided estate.

The term *self-acquired property*, as distinguished from *joint property*, explained.

Property originally self-acquired, because acquired without detriment to joint ancestral estate, becomes joint when it has been mixed with and treated as part of the said joint estate by the coparceners.

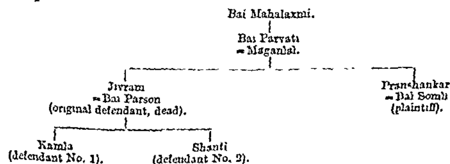
1912.

BAI PARSON v. BAI SOMLI.

SECOND appeal from the decision of A. C. Wild, Joint Judge of Ahmedabad, varying the decree passed by J. N. Bhat, Subordinate Judge at Borsad.

The facts were that one Bai Mahalaxmi owned the property, which she devised on her death to her daughter Bai Parvati. When Bai Parvati died, the property was inherited by her two sons, Jivram and Pranshankar. Of these two, Pranshankar was the first to die. Jivram thereupon took possession of the whole of the property On Jivram's death, the property passed into the possession of his widow Bai Parson (the defendant). Pranshankar's widow Bai Somli filed this suit against Bai Parson, to recover from her by partition a moiety of the property. Bai Parson died during the pendency of the suit; she was represented by her two daughters Kamla and Shanti (defendants Nos. 1 and 2).

The following genealogical tree shows the relationship of the parties :—



The defendant in her written statement contended *inter alia* that the estate taken by Jivram and Pranshankar was

1912.

BAI PARSON v. BAI SOMLI.

joint in interest and that on Pranshankar's death Jivram took the whole estate by survivorship.

The lower Court decreed the plaintiff's claim, holding that Parvatishankar and Jivram held the property as tenants-in-common and not as joint tenants.

The defendant appealed to the High Court.

L. A. Shah for the appellant.—The case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[1] is a conclusive authority on the point in dispute here. The doctrine of survivorship is not limited to unobstructed succession and will obtain in the case of sons inheriting from their mother. Refers to *Karuppai Nachiar* v *Sankaranarayanan Chetty*[2] and *Bai Rukhmani* v. *Keshavlal*[3].

Whatever the law may be in this respect under the Mitakshara, it cannot be the same under the Mayukha. The definition of "Daya" or heritage under both systems are different. See Vyavahara Mayukha, c. 4, s. 2, pl. 1 and 2; Mitakshara, c 1, s 1, pl. 2 and 3.

G. N. Thakor for the respondent.—The Privy Council case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[1] does not apply, for in Madras under the Mitakshara, the daughter's sons inherit directly to their maternal grandfather, which is not the case in Bombay.

There is no difference between the Mitakshara and the Mayukha *in this respect. The doctrine of survivorship* does not rest on the definition of heritage.

Again, the technical stridhan of a woman descends to her daughters as tenants-in-common; the same should be the case when the sons of daughter inherit. Refers to *Jogeswar Narain Deo* v. *Ram Chandra Dutt*[4].

L. A. Shah, in reply, cited West and Buhler, p. 300 (3rd edition), Mayukha, c. 4, s 2

(1) (1902) 25 Mad. 678.
(2) (1903) 27 Mad. 300.
(3) (1907) 9 Bom. L. R. 1293.
(4) (1896) 23 Cal. 670.

CHANDAVARKAR, J. :—The only question for decision on this second appeal, arising under the Vyavahara Mayukha, is whether the sons of a woman who inherit her *stridhan* property, take it jointly as coparceners or severally as tenants-in-common.

The lower Courts have held that they take it severally as tenants-in-common, on the authority of the Full Bench ruling of the Madras High Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty*[1]. That decision has been followed by a Division Bench of this Court, consisting of the learned Chief Justice and Batchelor, J, in *Dattambhat bin Appanbhat* v *Yamnabai kom Rambhat*[2]. Both these decisions are under the law of the Mitakshara It is urged in support of this second appeal that the law of the Mayukha is otherwise. Reliance is placed on the passage in that authority, where the word *daya* (heritage) is defined and then explained by the author, Nilakantha (Ch. IV, sec. 2, placita 1 and 2, pp. 46 and 47, of Stokes' Hindu Law Books). There, after defining *daya* as "wealth not reunited, nor put back again into a common stock, and (still) admitting of partition," Nilakantha goes on to quote from the *Smriti Sangraha*, which says —"That which is received through the father, and that received through a mother, is described by the term *Heritage*" Upon this it is argued that, since property inherited by sons from their mother is put by the text quoted from the *Smriti Sangraha* upon the same footing as property inherited by them from their father, and since the law of coparcenary undoubtedly obtains as to the latter, it ought to prevail as to the former also

Before discussing the soundness of this argument, it will be convenient to consider first the basic principle or root-idea of the term coparcenary or joint tenancy under the Hindu law, and then to determine whether that principle is common to both the Mitakshara and the Mayukha.

(1) (1904) 27 Mad 300

(2) S. A. No. 277 of 1911, decided on 1st December 1911 (Un Rep.).

1912.

BAI PARSON v. BAI SOMLI.

One of the cardinal principles of Hindu law, borrowed from its Shastras, is that a son is his father reborn. This principle rests on a passage from the Vedas quoted by Baudhayana, in which a father thus addresses his son:—"From my several limbs thou art distilled; from my heart thou art produced; thou art indeed myself but denominated son." Every son is, therefore, identified in interest with his father and all the sons together with him constitute one body, so to say, in the eye and for the purposes of law and the Shastras. So, Vijnaneshwara tells us that when a father brings a suit as to his own property, his son or sons can appear for him and prosecute the suit even when he is living and that, because the word *plaintiff* includes the sons and grandsons of the man suing, "their interests being identical" (Mit. Moghe's Edn No. 3, p. 113). Starting with that idea of identity, the law has engrafted on it the principle that every son takes an interest by birth in his father's property. Hence the injunction that a man shall not give away the whole even of his self-acquired property when he has sons, because "procreating sons, the father must perform their initiatory ceremonies and provide for their livelihood" (see the Chapter on gifts of the Mitakshara, Moghe's Edn. No 3, p. 225; West and Buhler's Digest, 3rd Edn., p 759, note). The same injunction is given in the Mitakshara in placitum 27 of Ch. I, sec. 1: "Though immoveables ... have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should, therefore, be made" (Stokes, pp 375 and 376).

The doctrine that sons take property in their father's estate by birth is propounded by the Mitakshara in a highly learned disquisition (Ch. I, sec. 1, pl. 17 to 22) in answer to those who maintain that the "property" of the sons "is not by birth but by demise of the owner, or by partition." According to the latter, all property, whether inherited from the father or other relations, is of the same character, the man inheriting getting ownership in it on the death of the person

from whom it is derived. The Mitakshara and those who follow it hold otherwise. They distinguish between property inherited by sons from their father and property inherited from others The former they call unobstructed succession; the latter obstructed succession. According to the opposite school, all inherited property is obstructed succession. The Vyavahara Mayukha discusses the question and upholds the view of the Mitakshara. The passage in the Mayukha (Ch. IV, sec. 1, pl. 3, Stokes) is as follows:—

"According to Dhareshvara Acharya, 'the ownership of sons and the rest, in the wealth of the father, is not generated previously during his life, but is produced by partition.' And the author of the Smriti Sangraha says the same But it is not so."

It will be perceived from these discussions in the Mitakshara and the Mayukha that their view is that sons take interest in their father's property *by birth*, and that the opposite view which they combat is that the sons' interest arises *by partition.* The contrast between these two expressions, *by birth* and *by partition*, is significant, because in them lies the root-idea or basic principle of the coparcenary system as distinguished from a tenancy-in-common. To take ownership in an estate *by partition* is to take a defined share in it as a severalty at the very moment that it falls in as an inheritance. When the father dies, the estate at once of itself comes to the sons by partition in shares. To take the estate *by birth* means to have an inchoate, undefined interest, and all the sons take it as an aggregate of persons standing as the father reproduced; so, when the estate falls in as an inheritance on the father's death, no son can say "this is my share," but all take what was a joint interest from the time of their birth.

Hence it is that the right of sons to inherit their father's property is termed unobstructed succession (*apratibandha daya*). They are the primary heirs, whose interest arises when they are born and that interest ripens in its joint condition when the father dies and inevitably comes to them as

1912.

BAI PARSON
v.
BAI SOMLI.

One of the cardinal principles of Hindu law, borrowed from its Shastras, is that a son is his father reborn. This principle rests on a passage from the Vedas quoted by Baudhayana, in which a father thus addresses his son:— "From my several limbs thou art distilled; from my heart thou art produced; thou art indeed myself but denominated son." Every son is, therefore, identified in interest with his father and all the sons together with him constitute one body, so to say, in the eye and for the purposes of law and the Shastras. So, Vijnaneshwara tells us that when a father brings a suit as to his own property, his son or sons can appear for him and prosecute the suit even when he is living and that, because the word *plaintiff* includes the sons and grandsons of the man suing, "their interests being identical" (Mit. Moghe's Edn. No 3, p. 113). Starting with that idea of identity, the law has engrafted on it the principle that every son takes an interest by birth in his father's property. Hence the injunction that a man shall not give away the whole even of his self-acquired property when he has sons, because "procreating sons, the father must perform their initiatory ceremonies and provide for their livelihood" (see the Chapter on gifts of the Mitakshara, Moghe's Edn. No. 3, p. 225; West and Buhler's Digest, 3rd Edn., p 759, note). The same injunction is given in the Mitakshara in placitum 27 of Ch. I, sec. 1: "Though immoveables.. have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should, therefore, be made" (Stokes, pp. 375 and 376).

The doctrine that sons take property in their father's estate by birth is propounded by the Mitakshara in a highly learned disquisition (Ch. I, sec. 1, pl. 17 to 22) in answer to those who maintain that the "property" of the sons "is not by birth but by demise of the owner, or by partition" According to the latter, all property, whether inherited from the father or other relations, is of the same character, *the man* inheriting getting ownership in it on the death of the person

from whom it is derived. The Mitakshara and those who follow it hold otherwise. They distinguish between property inherited by sons from their father and property inherited from others. The former they call unobstructed succession; the latter obstructed succession. According to the opposite school, all inherited property is obstructed succession. The Vyavahara Mayukha discusses the question and upholds the view of the Mitakshara. The passage in the Mayukha (Ch. IV, sec. 1, pl. 3, Stokes) is as follows:—

> "According to Dhareshvara Acharya, 'the ownership of sons and the rest, in the wealth of the father, is not generated previously during his life, but is produced by partition.' And the author of the Smriti Sangraha says the same. But it is not so."

It will be perceived from these discussions in the Mitakshara and the Mayukha that their view is that sons take interest in their father's property *by birth*, and that the opposite view which they combat is that the sons' interest arises *by partition*. The contrast between these two expressions, *by birth* and *by partition*, is significant, because in them lies the root-idea or basic principle of the coparcenary system as distinguished from a tenancy-in-common. To take ownership in an estate *by partition* is to take a defined share in it as a severalty at the very moment that it falls in as an inheritance. When the father dies, the estate at once of itself comes to the sons by partition in shares. To take the estate *by birth* means to have an inchoate, undefined interest, and all the sons take it as an aggregate of persons standing as the father reproduced; so, when the estate falls in as an inheritance on the father's death, no son can say "this is my share," but all take what was a joint interest from the time of their birth.

Hence it is that the right of sons to inherit their father's property is termed unobstructed succession (*apratibandha daya*). They are the primary heirs, whose interest arises when they are born and that interest ripens in its joint condition when the father dies and inevitably comes to them as

1912.

BAI PARSON
v.
BAI SOMLI.

One of the cardinal principles of Hindu law, borrowed from its Shastras, is that a son is his father reborn. This principle rests on a passage from the Vedas quoted by Baudhayana, in which a father thus addresses his son:—"From my several limbs thou art distilled; from my heart thou art produced; thou art indeed myself but denominated son." Every son is, therefore, identified in interest with his father and all the sons together with him constitute one body, so to say, in the eye and for the purposes of law and the Shastras. So, Vijnaneshwara tells us that when a father brings a suit as to his own property, his son or sons can appear for him and prosecute the suit even when he is living and that, because the word *plaintiff* includes the sons and grandsons of the man suing, "their interests being identical" (Mit. Moghe's Edn. No. 3, p. 113). Starting with that idea of identity, the law has engrafted on it the principle that every son takes an interest by birth in his father's property. Hence the injunction that a man shall not give away the whole even of his self-acquired property when he has sons, because "procreating sons, the father must perform their initiatory ceremonies and provide for their livelihood" (see the Chapter on gifts of the Mitakshara, Moghe's Edn. No. 3, p. 225; West and Buhler's Digest, 3rd Edn., p. 759, note). The same injunction is given in the Mitakshara in placitum 27 of Ch. I, sec. 1: "Though immoveables ... have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should, therefore, be made" (Stokes, pp. 375 and 376).

The doctrine that sons take property in their father's estate by birth is propounded by the Mitakshara in a highly learned disquisition (Ch. I, sec. 1, pl. 17 to 22) in answer to those who maintain that the "property" of the sons "is not by birth but by demise of the owner, or by partition." According to the latter, all property, whether inherited from the father or other relations, is of the same character, the man inheriting getting ownership in it on the death of the person

the moment it falls in. Obstructed succession, in other words, is *partitioned* succession; unobstructed succession is *unpartitioned* heritage, subject to partition at the option of the sons inheriting.

This division of heritage into unobstructed and obstructed succession, adopted in the Mitakshara and followed in the Mayukha and the Viramitrodaya, who belong, generally speaking, to the Mitakshara school, is not recognised by another school of Hindu lawyers, which maintains that it is only on the death of a propositus, whether father or not, that the property of the heir arises and that "heritage is in all cases obstructed and never otherwise." (Viramitrodaya, Sarkar's Edn, Ch. I, sec. 22, p. 13.)

This contrast between unobstructed and obstructed succession is further brought out by Vijnaneshwara in other portions of the Mitakshara. For instance, in the Chapter on Debts, he first deals with the liability of the sons and grandsons of a deceased Hindu to pay his debts Then he discusses the question:—Who is liable to pay them if the deceased has left no sons or grandsons? Yajnyavalkya's text answers that in that case the person who takes the deceased's property as heir must pay the debts. That person is termed in the text *rikhta grahaha, i. e.*, the person who takes the *rikhta* or inheritance. But we have seen that the term *rikhta*, as explained by Vijnaneshwara, means primarily not all but only unobstructed inheritance, *i. e.*, the inheritance of sons and grandsons and great-grandsons. How then does it come to be applied here by Yajnyavalkya on the subject of Debts to the case of obstructed succession? To remove ambiguity on that score, Vijnaneshwara explains what the term *rikhta grahaha*, as used by Yajnyavalkya, in the text in question means. "(The term) *rikhta grahaha* (means) he who takes the inheritance by means of partition as the door, *vibhaga dwarena*)". That is to say, the person so taking enters into the inheritance through or by means of partition—at the very moment it comes to him it comes *partitioned*, so that if there are several heirs to the property in the case of obstructed succession, they

1912.

BAI PARSON v. BAI SOMLI.

take it by division as a natural and inherent incident of their right attached by law.

These considerations do not apply to property inherited by sons from their father. The term unobstructed succession (*apratibandha daya*) is exclusively used of that property and is out of place in the case of all other property such as that inherited by the sons from their mother or from other relations. In the latter case, the heir inheriting does not take any interest in the property by birth; and the basic principle of a coparcenary is essentially absent with reference to the right to inherit. When it comes to the heirs on the death of the propositus, it comes not in virtue of a right pre-existing from their birth but in virtue of the character of *partition* annexed by law to it as obstructed succession.

So far, then, as the Vyavahara Mayukha is concerned, it agrees expressly with the Mitakshara in maintaining that sons take interest in their father's property from their *birth*, and not by *partition*. As to the other considerations derived from the Mitakshara, that is, as to its definition of *rikhta* or heritage as unobstructed succession and of *samavibhaga* or partition as obstructed succession, it is true that Nilakantha is silent. But on the established principle of this Court, his silence must be regarded as assent to the propositions laid down in the Mitakshara and dealt with in the foregoing part of this judgment, unless we find in the Vyavahara Mayukha anything which either expressly or by necessary implication shows that Nilakantha intended to apply the law of coparcenary also to property inherited by sons from their mother.

It is urged for the appellant that Nilakantha does so intend, because in explaining the definition of *daya* (heritage) he quotes the *Smriti Sangraha* which says that that term applies both to paternal and maternal heritage. That definition of *daya*, it must be remembered, is from a *smriti* or text, and, seeing that a *smriti* is generally meant to be the condensed expression of a rule, it is in every case a question whether the subjects or objects specified in it are exhaustive or whether they are illustrative. Now, in the case of the text

quoted by Nilakantha from the *Smriti Sangraha*, on which the appellant's pleader strongly relies in support of his argument, we have Nilakantha's own explanation to make it clear beyond doubt that the text in question is illustrative, not exhaustive. After quoting that text, he goes on to quote also from the *Nighantu* where it is said:—"The learned define heritage to be the wealth of a father, which admits of partition." Here is an apparent contradiction between the text from the *Smriti Sangraha* and the text from *Nighantu.* The former says heritage means *paternal* and also *maternal* property. The latter says it is *paternal* property Nilakantha cites both. How are they to be reconciled? He reconciles them by explaining that "the word *father* is merely put to denote relations in general, as a part for the whole." In Nilakantha's view, *daya* means heritage derived from any relation, father, mother, brother or so forth, the word "father" being merely illustrative. So the word "mother" in the text from the *Smriti Sangraha* comes in by way of description, not enumeration.

It must be observed here that, though the words *daya* and *rikhta* are sometimes used indiscriminately to mean heritage in general, their strictly legal connotations are different and even popular language recognises that. A *dayada* in popular language is one who takes a deceased's estate by obstructed succession. That is its strictly legal sense also. The word *rikhta* primarily means in law he who takes by unobstructed succession. Often they are used as if they were interchangeable, but that is not strictly legal, according to Hindu law. Vijnaneshwara points this out in pl. 33 of Ch. I, sec. 11, of the Mitakshara (Stokes), where he says:—"The word 'heir' (dayada) is frequently used to signify any successor other than a son."

If, then, both the Mitakshara and the Mayukha so far agree, is there anything in their treatment of the subject of *stridhan* and of devolution to it to support the argument of the appellant's pleader? According to both those authorities, heritage in the case of *stridhan* is obstructed succession; so partition is its natural incident. According to both again, as

1912.

BAI PARSON v. BAI SOMLI.

interpreted by this Court, when daughters, and, in default of them, their daughters, inherit the mother's estate they take as tenants-in-common. The same law must apply to the sons also, when they in their turn inherit, in the absence of any express rule that the law as to unobstructed succession applies. No distinction is made as between daughters and sons with reference to the character of their right to inherit their mother's *stridhan*. They all stand forth as *heirs*, and if daughters take as tenants-in-common, the sons ought to take as such on the principle of the canon called *Nyaya Samya* (rule from equity). And that the canon was intended to apply is clear from the gloss of the Mitakshara on a text of Manu quoted in the Chapter on *Stridhan* (Ch. II, sec. 11, pl. 19 and 20, Stokes, pp. 462 and 463). Manu's text is: "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." On this the Mitakshara's gloss is:—"All the uterine brothers should divide the maternal estate equally, and so should sisters by the same mother" Both brothers and sisters are put on the same footing, so far as the nature of the right is concerned. In the case of both, the right of inheritance accrues when the mother dies; that is the point of time; and it is at that point that the division takes effect, whether sisters take or brothers take. The inheritance and the division are simultaneous in either case.

As held by a Full Bench of this Court in *Dayaldas Laldas* v *Savitribai*[1], the Mayukha interprets the abovementioned text of Manu with reference to *anvadheya stridhan* differently from the Mitakshara. While the latter takes it to mean that brothers form a class of heirs separate from the sisters and that the division mentioned is of brothers *inter se* and of sisters *inter se*, the Mayukha interprets the text as meaning that both the brothers and the sisters inherit together as one class and the division mentioned is of the mother's estate among them all equally. This difference of interpretation does not affect the question before us. Both the Mitakshara and the

(1) (1909) 34 Bom. 385.

Mayukha agree so far that, whether the brothers and the sisters form one class or two distinct classes, they take, when they take at all, by division. Nay, the Mayukha's interpretation serves as a cogent reply to the appellant's argument. If the *anvadheya stridhan* is inherited by brothers and sisters together as one class, and the sisters take as tenants-in-common, it follows the same rule must apply to the brothers, as they stand in the same category of heirs. This is on the rule of Hindu law laid down by Baudhayana (according to the Viramitrodaya), and by Ushanas (according to the Mitakshara), that "what is affirmed of even one among many that have a common property, the same is to be extended to all, since they are declared to be similar" (see the Viramitrodaya, Sarkar's Edn, Ch II, pt. 1, sec 10, p 59; the Mitakshara, Moghe's Edn. No 3, p 397).

But it is urged for the appellant that, in dealing with the question of partition, both the Mitakshara and the Mayukha make no distinction between property inherited by sons from their father and property inherited by them from their mother. It is argued upon that, that both the authorities intended to put both the properties on the same footing and treat them as joint and subject to partition among the sons holding both as coparceners This argument overlooks the fact that even in the case of property which is inherited by the sons from their mother, the law must lay down what its character is as a succession coming in a *partitioned* condition as a tenancy-in-common. It would not have done for the law simply to have said that the estate falls in as an estate *divided* in interest, because that gives rise to the question —What interest does each son take? How is that interest to be determined? Hence the necessity of dealing with the property as a subject of partition. Because in so dealing with it the law-givers and the commentators deal also at the same time with the mode and time of partition of the property inherited from the father, when this partition is made by the sons by mutual agreement after the estate has come to them as joint in character, it does not follow that the mother's property is also inherited as

1912.

BAI PARSON v. BAI SOMLI.

interpreted by this Court, when daughters, and, in default of them, their daughters, inherit the mother's estate they take as tenants-in-common. The same law must apply to the sons also, when they in their turn inherit, in the absence of any express rule that the law as to unobstructed succession applies. No distinction is made as between daughters and sons with reference to the character of their right to inherit their mother's *stridhan*. They all stand forth as *heirs*; and if daughters take as tenants-in-common, the sons ought to take as such on the principle of the canon called *Nyaya Samya* (rule from equity) And that the canon was intended to apply is clear from the gloss of the Mitakshara on a text of Manu quoted in the Chapter on *Stridhan* (Ch. II, sec. 11, pl. 19 and 20, Stokes, pp 462 and 463). Manu's text is "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." On this the Mitakshara's gloss is :—"All the uterine brothers should divide the maternal estate equally; and so should sisters by the same mother." Both brothers and sisters are put on the same footing, so far as the nature of the right is concerned. In

nally acqu... both, the right of inheritance accrues when the
own exertions, and bo... the point of time; and it is at that point
common stock and turned into ... whether sisters take or brothers
aw is that self-acquired property is tha... are simultaneous in
a member of a joint family by his own ex...
letriment to the joint property and not thrown ... ...das v.
common stock When Yajnyavalkya speaks of self-acquire...

property as property acquired without detriment to the *paternal* estate and Vijnaneshwara in his gloss speaks of it as property acquired without the help of the *paternal* and *maternal* estate, both mean in substance by such estate all estate which is joint in character, whatever its derivation. If the argument we are noticing is sound, we must take Yajnyavalkya's text and Vijnaneshwara's gloss in their literal sense and restrict self-acquired property to that which is acquired without detriment only to the paternal or to the maternal estate of the joint family and we must exclude all other property, acquired by inheritance or otherwise and then thrown into the common stock.

Such exclusion is not sanctioned by Hindu law—Yajnyavalkya's text defining self-acquired property and the glosses of Vijnaneshwara and of Nilakantha do not warrant it. The sensible way of interpreting Vijnaneshwara's gloss is, therefore, to take the word *maternal estate* as standing for all property, which, though not inherited from the father but acquired otherwise by the members, has been nevertheless thrown into the common stock and so has become joint by being mixed up with the paternal estate.

The paternal estate is the determining and dominant factor of the joint tenancy When other estate is mentioned with it with reference to a joint family, the meaning is that that other estate has become joint by becoming through the volition of the coparceners mixed with the paternal estate and, therefore, partaking of its character. In other words, the words *paternal estate* in Yajnyavalkya's text and *paternal and maternal estate* in Vijnaneshwara's gloss must be treated as illustrative and refer to all property treated as joint, though at the time of acquisition by inheritance or otherwise it had been self-acquired.

On these grounds we must hold that, under the law of the Vyavahara Mayukha as also under that of the Mitakshara, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common. This conclusion is in accordance with the view of the learned authors of West and Buhler's Digest (see note *c*, pages 710 and 711, 3rd Edn.)

The decree must, therefore, be confirmed with costs.

Decree confirmed.

R. R

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.
January 23.

SAPURLO SAISHETTI (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Grant of occupancy by Government under a kabulayat—Condition as to resumption for Government purposes, that is, for Railway and other purposes—Sale by Government—Construction of the condition—Government full proprietors.

Under a kabulayat the occupancy of certain land had been granted to the plaintiff by the Collector subject only to the condition that it should be competent to Government to resume the land whenever it should be required by Government for Government purposes, that is, for Railway or other purposes. Afterwards the land was resumed and was sold to defendant 2 (from whose grandfather it was originally acquired for a Railway). The plaintiff, thereupon, brought the present suit against the Secretary of State for India in Council and defendant 2 for the recovery of the land on the ground that the sale to defendant 2 was not for Government purposes.

Held, dismissing the suit, that Government were the proprietors of the land and as such they could resume it whenever they required it for their proprietary purposes.

Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary powers.

FIRST Appeal against the decision of T. Walker, District Judge of Kanara, in Original Suit No. 1 of 1909.

The plaintiff alleged that—

The lands in dispute were acquired by Government from their owner in the year 1864 for an anticipated Railway project, and the said project having fallen through, Government let out the lands annually till 1890, in which year they were leased to plaintiff on condition that he should pay Rs. 208 to Government every year and surrender possession of the lands if they be required by Government for Railway or other purposes. A kabulayat to the said effect was taken from the plaintiff on the 1st May 1890. In the year 1906 the Commissioner, Southern Division, offered to plaintiff the continuance of the

* First Appeal No. 215 of 1910.

said lands on survey tenure on payment of Rs. 6,450. The plaintiff paid the said amount and a further sum of Rs. 403-2-0 and thus became owner on survey tenure. Government, however, on the 25th March 1909 returned to the plaintiff the above sums of money with 15 per cent. compensation and evicted the plaintiff from the lands in favour of defendant 2. Hence the suit for possession with mesne profits from the date of suit.

1912.

SAPURLO SABSHETTI v. THE SECRETARY OF STATE FOR INDIA.

The kabulayat referred to in the plaint was as follows :—

Kabulayat.

To the Mamlatdar of Karwar Taluka

I, Sapurlo Sabshetti, resident of Mouje Baad, in Karwar Taluka of the Kanara District, do, by this kabulayat accept the holding of the land comprised in the Survey numbers mentioned in the margin and situated in the village of Baad in the taluka of Karwar in Kanara District, on my behalf and also on behalf of my present and future (co) khatedars. And I pray that my name should be entered in the records of Government as the khatedar of the said land.

The numbers shown in the margin (are given to me?) for temporary cultivation under Order No 661, 14th April 1890, from the Fasli year 1300 (1890 to 1891 A.D.) on condition of my paying Rs. 208 and the anna cess every year *and also on condition of my giving up the land for Railway and other purposes without claiming compensation whenever the same may in future be required for Government purposes.*

For the Railway Road.

Survey Number.	Acres.		Assessment		
1295	12	30	58	0	0
708	3	15	15	0	0
	16	5	73	0	0

The said khata is subject to the Land Revenue Code of 1879 and to the decisions (rules ?) made thereunder which are in force, and is given temporarily from the 1st of May 1890. And I agree to pay in time the revenue of the (said) land that may be payable in respect of the said khata according to law.

Dated 1st May 1890

Written by Venkatrao Shanbhag.

Signature. (Mark) This mark is that of Sapurlo Sabshetti

The form of the kabulayat was printed but the words in italics were added in manuscript.

Defendant 1, the Secretary of State for India in Council, contended *inter alia* that the lands had been acquired for a

1912.

SAPURLO SABSHETTI v. THE SECRETARY OF STATE FOR INDIA.

Railway under the Land Acquisition Act from the grandfather of defendant 2, that the plaintiff had no permanent right and that he was not entitled to any relief.

Defendant 2, Anant Ganap Habba, pleaded that the lands had been acquired for a Railway and that as the purpose for which they had been acquired fell through, defendant 1 was bound to restore them to the persons from whom they were acquired or their heirs.

The Judge found that the plaintiff had not by payment of Rs. 6,540 and Rs. 403-2-0 acquired *malki* (ownership) right to the plaint lands, that under the kabulayat of 1890 Government were entitled to resume the lands at pleasure, that the Commissioner had no power to lease the lands on survey tenure without the sanction of Government and that the suit could not lie as Government acted under the statutory power conveyed in Land Revenue Code, section 211. The Judge, therefore, dismissed the suit.

The plaintiff appealed

Weldon with *S. V. Palekar* for appellant (plaintiff).

G. S Rao (Government Pleader) for respondent 1 (defendant 1).

N. A Shiveshvarkar for respondent 2 (defendant 2).

CHANDAVARKAR, J. —There were only two points urged by the learned Counsel in support of this appeal in his opening address, first, that there was a valid contract as between the Government and the plaintiff, who is the appellant, in consequence of his application to the Commissioner to purchase this land, and the acceptance by him of the conditions which were imposed by the Commissioner in consequence of that offer. It was urged that after the Commissioner had accepted the plaintiff's proposal to purchase this land by receipt of the money, it was not competent to Government to rescind the Commissioner's order, because, it was said, the acceptance vested the title in the appellant. It is not necessary to go at length into the reasons for disallowing this argument, because the learned Counsel has himself given it up in his rejoinder.

1912.

SAPURLO SABSHETTI v. THE SECRETARY OF STATE FOR INDIA.

It is clear from the provisions of the Land Revenue Code, and from the correspondence which passed between the different officers of Government, at the time the proposal of the plaintiff to purchase this land was considered, that the Commissioner was acting under section 60 of the Land Revenue Code, and that there was a Resolution of Government, at that time in force, which required that in respect of land of this description the Commissioner and the Collector could sell it only after obtaining the sanction of Government. Plainly upon the facts this was Railway land, not required just then for Railway purposes, and therefore, according to the evidence of Exhibit 44 the Commissioner could not dispose of it, in the way he did, without obtaining the sanction of Government.

The point on which the learned Counsel has laid special emphasis is his second argument, it is this He urges: If the plaintiff has not acquired any title in virtue of the Commissioner's order, he has a right to fall back upon his kabulayat, Exhibit 15. Under that kabulayat the occupancy had been granted to him by the Collector subject only to this condition that it should be competent to Government to resume the land whenever it should be required for Government purposes, *i. e*, for Railway or other purposes It is urged that the sale of the land to defendant 2, a private individual, is not such a purpose.

Now, the correspondence which had passed before the kabulayat, Exhibit 15, was executed makes it clear that what was intended by the contracting parties was that the land was to be resumed by Government whenever it was required by them for Railway or other purposes The words in Exhibit 15 no doubt enlarge those terms, because in Exhibit 15 it is stipulated that the Government could resume the land whenever they liked, for their purpose, either for a Railway or other Government purpose. These words are not to be found in the previous correspondence upon the subject. But even assuming that these words embodied the terms agreed upon,

1912.

SAPURLO SABSHETTI v. THE SECRETARY OF STATE FOR INDIA.

they are consistent with what was the real contract between the parties. The words in Exhibit 15, on which Mr. Weldon has laid so much stress, do not mean more than that Government as proprietors of the land could resume it whenever they required it for their proprietary purposes. Any other construction would be inconsistent with the conditions of the tenure on which this land was held at the time by the plaintiff. This land was not held under the kabulayat, Exhibit 15, on the ordinary rayatwari tenure, because it was not subject to the thirty years' settlement Government still remained proprietors of the land, like any private owner, and were not merely the State entitled only to the assessment and having the right to enhance that assessment at the end of the usual period of the thirty years' settlement. They were full proprietors who could deal with the land in any way they liked like any private owner They granted this land under the terms of the kabulayat, Exhibit 15. They dealt with the plaintiff like any ordinary proprietor, with this difference that the provisions of the Land Revenue Code and the Rules made under it applied to the case so far as they could apply. But the provisions of the Land Revenue Code, and the terms of the kabulayat could not take away the proprietary character of the title of Government

If, then, Government were proprietors, then Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary powers

On these grounds, I think, the decree must be confirmed with costs. There must be separate sets of costs.

BATCHELOR, J. :—I agree. It seems to me that, so far as concerns the Commissioner's order of October 1906, upon which reliance was placed for the appellant, the appellant can get no advantage from that order seeing that it was first suspended by Government and then finally annulled under the power

vested in Government for that purpose by section 211 of the Land Revenue Code. It may be added that no kabulayat was given to the appellant in order to vest in him any right of occupancy. As to the old kabulayat (Exhibit 15), that must be read and interpreted by the light of the appellant's application (Exhibit 36) upon which it was based, and by the light of the local officers' reports and decisions connected therewith. So reading it, it appears to me quite clear that the manuscript phrase added to the margin of this kabulayat means only that the appellant undertook to surrender this land whenever Government in their discretion required him to do so.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

GOVIND BALKRISHNA JOSHI (PLAINTIFF), APPLICANT, v. PANDURANG VINAYAK JOSHI (DEFENDANT), OPPONENT.*

1912. *March 1.*

Provincial Small Causes Courts Act (IX of 1887), Schedule II, clause 35, sub-clause (l)—Threat to assault—"Injury to the person"—Exemption from the cognizance of the Court of Small Causes.

A suit to recover damages from the defendant who ran after the plaintiff with a shoe in hand threatening to beat him and using abusive language, but did not actually touch the plaintiff's person, is a suit for "injury to the person" within the meaning of clause 35, sub-clause (l) of the second schedule of the Provincial Small Causes Courts Act (IX of 1887) and is not within the cognizance of the Small Cause Court.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Causes Courts Act, IX of 1887) against the decision of C. Roper, District Judge of Poona, dismissing an appeal under Order XLI, rule (2) of the Civil Procedure Code (Act V of 1908) against the order of D. G. Medhekar, First Class

---

* Application No. 212 of 1911 under the extraordinary jurisdiction and Civil Reference No. 13 of 1911.

1912.

GOVIND BALKRISHNA v. PANDURANG VINAYAK.

Subordinate Judge of Poona, also Civil Reference by R. G. Bhadbhade, Judge of the Court of Small Causes at Poona.

Plaintiff, Govind Balkrishna Joshi, brought a suit to recover Rs. 75 as damages from defendant, Pandurang Vinayak Joshi, who ran after the plaintiff with a shoe in his hand, threatening him and using abusive language, but did not actually touch the person of the plaintiff. The suit was brought in the Court of the First Class Subordinate Judge of Poona who, being of opinion that the suit could not lie in his Court, returned the plaint for presentation to the Court of Small Causes at Poona. The grounds for the return of the plaint were as follows:—

But what is meant by that sub-clause is "injury to the person" and not injury to "a person". "The person" would mean the bodily form or human frame. In the present case there was no injury to the person or the bodily frame, but an injury to the personal liberty of the plaintiff. The plaintiff in his examination (Exhibit 6) states that the alleged loss was sustained by him, not by reason of any actual injury to his body, but by reason of his being prevented from carrying on his avocation and by having to undergo expenses in prosecuting the defendant. Such an injury is not, I think, contemplated by sub-clause (l) of clause 35 of the second schedule of Small Causes Courts Act.

The plaintiff appealed to the District Judge, who dismissed the appeal under Order XLI, rule (2) of the Civil Procedure Code (Act V of 1908), observing:—

The suit would ordinarily be one which the Small Cause Court alone could try (see sections 15 and 16, Provincial Small Causes Courts Act). The appellant however relies on clause 35 (l) of the second schedule to the Act. That provision exempts from Small Cause Court's jurisdiction suits for compensation for injury to the person in any case not mentioned in the other sub-clauses of clause 35. It is admitted, and also appears from the plaint, that no actual injury to the person was caused by the defendant. The assault alleged took the form of threat and gesture and did not go to the extent of injuring the person.

The plaintiff applied to the High Court under the extraordinary jurisdiction (section 25 of the Provincial Small Causes Courts Act IX of 1887), urging that the District Judge erred in holding that the First Class Subordinate Judge's Court had no jurisdiction to entertain the suit which was for compensation for injury caused by assault to the plaintiff, that clause 35 (l) of the Provincial Small Causes Courts Act was clearly applicable and that the assault was personal injury and a suit based on assault was a suit for injury to the person.

1912

GOVIND BALKRISHNA v. PANDURANG VINAYAK.

In the meanwhile the plaintiff presented his plaint to the Court of Small Causes at Poona, and the Small Cause Court Judge, feeling a doubt as to whether his Court had jurisdiction to entertain the suit, referred the question to the High Court in the following terms:—

Now, assaults are classed in the Text Book on Torts under "injury to person". Any gesture calculated to excite the party, threatened a reasonable apprehension that the threat would be immediately carried into effect, if coupled with a present ability to carry such threat into execution constitutes an assault in law

The First Class Sub-Judge appears to have held that there was no complete assault; but actual touching is not necessary. See Ratanlal on Torts, page 151, 4th Edition, and *Stephens* v *Myers*, set out at page 152 in the above.

I am of opinion that the suit is not cognizable by this Court.

The application and the reference were heard together.

P. D. Bhide for the applicant.

D. G. Dalvi (*amicus curiæ*) in support of the reference.

B. V. Desai (*amicus curiæ*) against the reference.

SCOTT, C. J.—The action complained of by the plaintiff would be an assault and an offence affecting the human body under the Penal Code. It also would be an assault under the English law: see *Stephens* v *Myers*[1] We think also that it was an injury to the person within the meaning of clause 35, sub-clause (*l*), of the second schedule of the Provincial Small Causes Courts Act, and the suit was, therefore, not within the cognisance of the Small Cause Court

We set aside the decree of the First Class Subordinate Judge and remand the case for trial to him.

Rule made absolute

Costs costs in the cause

Rule made absolute.

G. B. R.

(1) (1830) 1 C & P. 349

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

1912. *March 12.*

HIMATLAL MOTILAL AND OTHERS (LEGAL REPRESENTATIVES OF ORIGINAL DEFENDANT 3 AND DEFENDANT 4), APPELLANTS, *v.* VASUDEV GANESH MHASKAR *alias* GANPATI BOA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3).*

Agreement by defendants 1 and 2 to sell property to plaintiff—Subsequent sale by the same defendants to defendants 3 and 4—Suit by the plaintiff for an order to execute a registered sale-deed and for possession—Burden of proof on defendants 3 and 4 to show that they were purchasers for value and bonâ fide *and without notice.*

Defendants 1 and 2 having agreed to sell their property to the plaintiff, they subsequently sold the same property to defendants 3 and 4.

In a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property,

Held, confirming the decree awarding the claim, that defendants 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants 3 and 4 were bound to show three things, namely, that (1) they were purchasers for value and (2) *bonâ fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed.

One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge.

FIRST appeal against the decision of G. V. Saraiya, *First* Class Subordinate Judge of Ahmedabad, in Original Suit No 417 of 1906.

The plaint alleged as follows :—

The village of Godadra situate in the Halol Taluka in the district of Panch Mahals was the inam of defendants 1 and 2 who on the 9th March 1906 agreed to sell it to the plaintiff for Rs. 36,251. The defendants on the same day passed to the plaintiff a "Banakhat" (agreement) on a stamp paper of one rupee and the plaintiff paid to them Rs. 101 on account of earnest-money. The plaintiff further gave to the defendants a Kabuliat (undertaking) of a respectable money-lender named Jethalal

* First Appeal No. 14 of 1910.

Harlochan and under the terms of the Kabuliat the defendants were to receive the remaining amount of the purchase-money after they had executed a regular deed of sale and had delivered possession of the village and also after the village had been transferred to the name of the plaintiff. Owing to the said undertaking by Jethalal he passed to the defendants a *chithi* (note). The plaintiff did all that he had to do under the contract when he gave Jethalal's Kabuliat to the defendants and was always ready and willing to perform his part of the contract, but the defendants failed to pass to him a regular registered deed of sale though they were repeatedly asked to do so. The plaintiff subsequently learnt that the defendants had dishonestly sold the said village under a registered deed for Rs. 40,000 to defendants 3 and 4, who had knowledge from the very beginning of the plaintiff's agreement of sale, dated the 9th March 1906. The transaction of defendants 3 and 4 was, therefore, null and void as against the plaintiff's agreement. The village in suit being adjacent to the plaintiff's village called Goraj the plaintiff had the right of pre-emption. The plaintiff, therefore, brought the present suit basing his cause of action in May 1906 for an order to defendants 1 and 2 to execute a deed of sale relating to the village of Godadra and to get it registered. He further prayed for the delivery of possession of the said village to him and for an injunction restraining the defendants from causing any obstruction in getting the village transferred to his name in the Government records The plaintiff sued also in the alternative for recovery of Rs 10,000 as damages and Rs. 101 paid to defendants 1 and 2 as earnest-money. The plaint was presented on the 14th July 1906.

On the 10th October 1906 defendants 1 and 2 filed a written statement but subsequently on the 27th July 1909, during the progress of the suit, they put in a substituted written statement in which they admitted the fact of the agreement with the plaintiff and stated that defendants 3 and 4, who were their creditors, threatened to do them harm if the village was sold to plaintiff and having undertaken to fight with the plaintiff, they passed to defendants 3 and 4 a deed of sale for Rs. 10,000.

1912.

HIMATLAL MOTILAL v. VASUDEV GANESH.

that owing to the said undertaking by defendants 3 and 4 they were given a copy of the "Banakhat" and of the *chithi* mentioned in the plaint and defendants 3 and 4 had, in collusion with some other persons, committed fraud.

Defendants 3 and 4 answered *inter alia* that they did not admit the correctness of the allegations made against them in the plaint, that they had purchased from defendants 1 and 2 the village in suit under a registered deed of sale, dated the 21st May 1906, that they had obtained possession under their purchase, that they had no knowledge of plaintiff's agreement, dated the 9th March 1906, that the plaintiff had no right of pre-emption, that their purchase represented a real transaction, that the suit was bad for misjoinder of causes of action and that they were *bonâ fide* purchasers for valuable consideration without notice of plaintiff's agreement.

The Subordinate Judge found that the plaintiff's suit was maintainable in the form in which it was brought and was not bad for misjoinder of causes of action, that the "Banakhat" or the agreement relied on by the plaintiff and the sale-deed relied on by defendants 3 and 4 were proved and defendants 3 and 4 had notice of the plaintiff's agreement at the time of their deed of sale, that the plaintiff was ready and willing to carry out the terms of the agreement, that defendants 1 and 2 had broken the contract to sell, that the sale-deed of defendants 3 and 4 was not nominal and void and had been carried into effect, and that the plaintiff was entitled to recover possession of the property in dispute by way of specific performance of the agreement. The Subordinate Judge, therefore, passed a decree in the following terms:—

The result of my findings is that the plaintiff is entitled to a decree for specific performance. I, therefore, declare that the sons of the original defendant 3 and the defendant 4 to hold the plaint village of Godadra for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 9th March 1906 (Exhibit 53), and order that upon all the defendants executing a proper deed of sale of the said village to the plaintiff (at the expense of the plaintiff) or to whom he shall appoint, such deed of sale to be settled by the Court in case the parties differ, the plaintiff do pay to the sons of the original defendant 3 and the defendant 4, Rs. 36,150 and then to recover from the defendants possession of the village

mentioned in the plaint with the Sanad and Daftars relating to the said village. All the defendants to pay the costs of the suit.

The legal representatives of defendant 3 who died while the suit was pending in the Subordinate Judge's Court and defendant 4 appealed.

G. S. Rao (Government Pleader), for the appellants (legal representatives of defendant 3 and defendant 4).

L. A. Shah, for respondent 1 (plaintiff).

M. K. Mehta, for respondents 2 and 3 (defendants 1 and 2).

RUSSELL, J.:—With regard to the first question we have to decide, namely, the question upon whom lies the onus of proof in this case, it appears that the plaintiff's agreement to purchase the property in question from defendants 1 and 2 is dated 9th February 1906. The agreement of defendants 1 and 2 with defendants 3 and 4, who are the purchasers of the same property (Exhibit 65) is dated the 21st May 1906 The defendants 3 and 4 therefore having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff must show three things, that they are purchasers for value, and *boná fide*, and without notice: *Mulji Jetha & Co.* v. *Macleod*[1]. The plaintiff under his contract has a prior equity. In *Varden Seth Sam* v. *Luckpathy Royjee Lallah*[2], it was said:—

"The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *boná fide*, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof."

This passage in the Privy Council judgment certainly seems to conflict with the statement of the law set out by West, J., in *Lalubhai Surchand* v. *Bai Amrit*[3], where he refers to several

(1) (1903) 5 Bom. L. R. 991. (2) (1862) 9 M. I. A. 307 at pp. 326-327.
(3) (1877) 2 Bom. 299 at p. 303.

mentioned in the plaint with the Sanad and Daftars relating to the said village. All the defendants to pay the costs of the suit.

1911

HIMATLAL MOTILAL v. VASANT GANESH

The legal representatives of defendant 3 who died while the suit was pending in the Subordinate Judge's Court and defendant 4 appealed.

G. S. Rao (Government Pleader), for the appellants (legal representatives of defendant 3 and defendant 4).

L. A. Shah, for respondent 1 (plaintiff).

M. K. Mehta, for respondents 2 and 3 (defendants 1 and 2).

RUSSELL, J. :—With regard to the first question we have to decide, namely, the question upon whom lies the onus of proof in this case, it appears that the plaintiff's agreement to purchase the property in question from defendants 1 and 2 is dated 9th February 1906. The agreement of defendants 1 and 2 with defendants 3 and 4, who are the purchasers of the same property (Exhibit 65) is dated the 21st May 1905. The defendants 3 and 4 therefore having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff must show three things, that they are purchasers for value, and *bonâ fide*, and without notice: *Mulji Jetha & Co. v. Macleod*(1). The plaintiff under his contract has a prior equity. In *Varden Seth Sam v. Luckpathy Royjee Lallah*(2), it was said :—

"The question to be considered is, whether the third and fourth defendants respectively possessed the land free from that lien, whatever its nature. He who owns property subject to a charge can, in general, convey no [illegible] more free than his own, it lies always on a [illegible] to defeat such prior charge. Let it be conceded that a purchaser for value, *bonâ fide*, and without notice of this charge, whether legal or equitable, would have had, in these Courts an equity superior to that of the pl[illegible] [illegible] must be, not merely asserted, but proved [illegible] such proof."

This passage in the Privy Council [illegible] to conflict with the statement [illegible] *Lalubhai Surchand v.* [illegible]

1912.

HIMATLAL MOTILAL v. VASUDEV GANESH

authorities in support of the proposition that in cases such as the present it is for the plaintiff to prove the notice. But it must be remembered that the burden of proof is not always a standing quantity. And West, J, at the bottom of page 303 says:—"The purchaser pleading absence of notice is 'held strictly to proof of the payment', that being an affirmative matter; but when he has thus far established his good faith, it devolves on the opposite party to prove notice or the circumstances from which the Court may infer a knowledge or means of knowledge of the previous transaction"

In this case therefore it devolved upon the defendants 3 and 4 to prove payment of the consideration before they got notice of the plaintiff's contract And the question has arisen whether that means payment of the whole consideration money or whether the position of defendants 3 and 4 is not made secure by reason of their conveyance having been registered, when it was, and part payment made by them before they got notice of the plaintiff's contract The defendants' contract was registered on the 22nd May 1906 Possession was delivered to them on the 26th May 1906 Before this suit was filed it appears that Rs 2,500 exactly was paid by them to defendants 1 and 2. The summons in the suit was served upon them on the 9th August 1906 As security for the payment of the residue of the purchase-money they had given Chithis for Rs 6,001 and Rs 4,224 and they appear to have paid off those Chithis subsequently It must be taken, therefore, that they had notice in any event on the 9th August 1906 when the summons was served upon them, as I have said

Mr. Rao in arguing for defendants 3 and 4 laid great stress upon the fact of registration, but in our opinion, that point does not avail him see *Chunder Kant Roy* v *Krishna Sunder Roy*(1). The head-note of that case is as follows —"Where a *bonâ fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent

(1) (1884) 10 Cal. 710.

1912.

HIMATLAL MOTILAL v. VASUDEV GANESH.

purchaser, although the latter's purchase may have been registered and although he has obtained possession under his purchase." After referring to a case, *Nemai Charan Dhabal* v. *Kokil Bag*[1], to which, however, section 27 of the Specific Relief Act did not apply, their Lordships set out section 27 of that Act, and say, "this shows, that where a party has notice of a prior contract for sale, he cannot, by any purchase that he may subsequently make, over-ride it."

Now in England it has been held that notice before actual payment of the whole of the purchase-money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract; for although the purchaser had no remedy at law against the payment of the residue, for which he gave his security, yet he would be entitled to relief in equity, on bringing his bill and showing that though he has given a security for payment of the residue of his purchase-money, yet he had since had notice of an incumbrance, under which circumstances the Court would stop payment of the money due on the security: *Tourville* v *Naish*[2], *Story* v. *Lord Windsor*[3], *More* v. *Mayhow*[4] and *Jones* v. *Stanley*[5]. And it appears to us that under the law in India the same principle must hold good. It is to be observed that in clause (*b*) of section 27 of the Specific Relief Act the words are:—"except a transferee for value who has paid his money in good faith and without notice of the original contract." There is nothing inconsistent in these words with the English rule above referred to.

Mr. Rao referred us to section 91 of the Indian Trusts Act which is as follows —

Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

(1) (1880) 6 Cal. 534.
(2) (1731) 3 P. Wm. 307.
(3) (1743) 2 Atk. 630
(4) (1661) 1 Ch. Ca. 34
(5) (1731) 2 Eq. Abr. 685 pl. 9.

1912.

HIMATLAL MOTILAL v. VASUDEV GANESH.

The word 'acquire' is quite consistent with the English rule that the purchase should be complete both by payment and conveyance before notice in order to defeat a person having a prior equity. Upon this ground alone the case may be decided in favour of the defendants.

But this Court is also of opinion that there is no good reason for dissenting from the conclusion arrived at by the learned Subordinate Judge that under the circumstances of the case the appellant should be held to have had knowledge of the plaintiffs' contract prior to the date of the conveyance. We do not propose to go in detail through this evidence but merely to set out the circumstances which have led us to infer that defendants 3 and 4 must be held to have had such knowledge. The first is that the sale of a village for a large amount of money, such as in the present case, must inevitably have been a matter of notoriety throughout the adjoining districts. Goraj where the plaintiff's agreement was executed is only 21 miles from Kalol where the defendants' agreement was executed. A considerable number of persons were present at the execution of both the contracts. The plaintiff's contract, Exhibit 53, was attested by Jethalal, Girdhar, Swarupgir, and written by Bhagwanji. There were 6 arbitrators who fixed the price which defendants 3 and 4 were to pay, 3 for defendants 1 and 2, and 3 for defendants 3 and 4. For defendants 1 and 2 the arbitrators were Bhagwanji, who lived at Halol, 7 miles from Kalol; Swarupgir of Kadochhala, where defendants 1 and 2 lived, which is 17 miles from Kalol, and Girdhar of the same place. The arbitrators for defendants 3 and 4 were Damodar of Godra, 15 miles from Kalol, Jagjivan also of Kalol and Mathur also of Kalol. Girdhar and Bhagwanji were the clerks it appears of defendants 1 and 2. We find it very difficult to believe that the existence of the plaintiff's contract was not referred to during the negotiations for the defendants' contract, and that defendants 3 and 4 were not aware of it.

The next circumstance is the unusual rapidity with which defendants' agreement was carried out. It was executed on the 21st May 1906; it was registered on 22nd May 1906 and

possession was delivered on 26th May 1906. In our opinion this is a very important circumstance as it shows an extraordinary and unusual carrying through of a contract in this country where proceedings as a rule are much more leisurely.

The next circumstance to be borne in mind is that defendants 1 and 2 had previously entered into a contract with Haribhaktiwala to sell the same property to him for considerably less sum than they had contracted to sell to the plaintiff. The Sanad relating to the property was redeemed by defendants 3 and 4 from Haribhaktiwala on 28th November 1906. This circumstance shows that defendants 1 and 2 were anxious to sell the property to the highest bidder totally regardless of any prior contracts that they may have entered into with other persons.

The next circumstance is the very considerable increase (about 4,000 rupees) in the purchase-money to be paid by defendants 3 and 4, as compared with the sum contracted to be paid by the plaintiff, with regard to which no satisfactory evidence it appears to us, has been given in explanation. Again the wording of the contract between defendants 1 and 2 and 3 and 4 is very peculiar. See p. 68. Why should any provision have been made for " Safildars " " neighbours making a claim or causing obstruction " if such a claim was not anticipated? Lastly the defendants 3 and 4 were mortgagees with a long standing mortgage in the village and this would account for their eagerness to acquire the equity of redemption at a higher rate than the intending purchaser, the plaintiff. In our opinion, therefore, defendants 3 and 4 must be taken to have had notice of the previous contract of defendants 1 and 2 with the plaintiff.

The only other point that was argued was that plaintiff was not ready and willing to carry out his contract, and that he thereby committed a breach thereof. And great stress was laid upon the fact that in para. 2 of his plaint, (which we take as read), the terms of the plaintiff's contract are not correctly set out. But we do not think that this para. of the plaint should be read so strictly as against the plaintiff for the addi-

1912.

HIMATLAL MOTILAL v. VASUDEV GANESH.

tional term to the contract set out therein may be taken to give the plaintiff's view of the agreement after he became aware of the contract between defendants 1 and 2 and defendants 3 and 4 with reference to the purchase of the village or a legal point suggested by the draftsman of the plaint. There is no evidence whatever to show that assuming the plaintiff did commit a breach of his contract defendants 1 and 2 accepted such breach. But there is one circumstance on this point which seems to us to dispose of this part of the case of defendants 3 and 4, and that is this, that if the plaintiff broke his contract and defendants 1 and 2 knew or acquiesced therein, they must have mentioned the fact of such breach and acquiescence or knowledge to defendants 3 and 4 before the latter entered into their contract, but it is not suggested anywhere in the evidence that any such mention was made.

The other point that was made was that Jethalal the Banker was not in a position to pay the money which the plaintiff had agreed should be paid to defendants 1 and 2, but we do not think, upon the evidence, that it would be possible to hold that Jethalal was not in a position to call up or to pay the money required.

Under these circumstances, it is not necessary to award damages to the plaintiff as against defendants 1 and 2.

Accordingly, we are of opinion, that the decree of the lower Court which has been carefully and correctly drawn should be confirmed, and the defendants pay the costs throughout.

Decree confirmed.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Knight, Chief Justice, and Mr. Justice Batchelor.

THE PANJAB NATIONAL BANK, LIMITED, APPELLANTS AND PLAINTIFFS, *v* THE MERCANTILE BANK OF INDIA, LIMITED, RESPONDENTS AND DEFENDANTS.*

1911. *January 19. March 6.*

Banker and customer—Effect of a blank draft which is not addressed to any specific banker—Negligence of customer leading to payment of forged cheque by banker—Effect of negligence when not the proximate cause of payment.

The plaintiffs were a Banking Corporation with their head office at Lahore and branch offices at Amritsar and elsewhere The defendants were a Banking Corporation having a branch at Bombay.

In 1904 the plaintiffs opened a current account with the defendants and sent the defendants a list of the officers of the plaintiffs authorised to sign for the plaintiffs, including the name of Madho Ram, the manager of the Amritsar office. Madho Ram had acted on occasions previous to this date as the manager of the Lahore office

It was the custom of Madho Ram when leaving the bank premises for a short time both when acting as manager at Lahore and afterwards when manager at Amritsar to leave with the accountant blank drafts and blank letters of advice ready signed by him for use as occasion occurred. These drafts were not destroyed after his return.

On the 2nd of October the defendants cashed a draft presented to them for payment for Rs. 10,000 purporting to have been signed by Madho Ram The defendants had previously received a letter of advice also purporting to have been signed by Madho Ram. The defendants debited the plaintiffs with the payment.

The plaintiffs repudiated the draft as a forgery and sued to recover Rs. 10,000 from the defendants.

The defendants denied that the draft was a forgery. In the alternative they submitted that the forged draft had been paid by them owing to the negligence of the plaintiffs, and that the latter were not entitled to recover the amount of the draft from them.

Held, that it was probable that the draft was one left by Madho Ram when acting as manager of the Lahore office of the plaintiffs, but that the plaintiffs were not estopped from contending that the draft was not the draft of the plaintiffs

Held, further, that it was not incumbent on the plaintiffs to contemplate the perpetration of such a crime as forgery or theft and that the negligent act of Madho Ram was not the proximate cause of the draft being cashed by the defendants, and that the plaintiffs were therefore entitled to recover.

* Suit No. 829 of 1909. Appeal No. 11 of 1910.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED

Société Générale v. *The Metropolitan Bank*(1), *Swan* v. *North British Australasian Company*(2), *Smith* v. *Prosser*(3) and *Baxendale* v. *Bennett*(4), followed.

THE plaintiffs were a Banking Company having their head office in Lahore and branch offices at Amritsar, Multan and other places. In the year 1905 the plaintiffs had no branch in Bombay. The defendants were also a Banking Company having their head office in England and branches at Bombay and other places.

In or about November 1904 the plaintiffs opened a current account in the books of the defendants at Bombay. It was agreed *(inter alia)* that the plaintiffs and their branches at Karachi, Amritsar, Ferozpore, Rawalpindi, Peshawar and Hoti should draw upon the said account.

A balance then standing to the account of the Amritsar branch of the plaintiffs and also certain other monies due from the defendants to the plaintiffs were transferred to the said current account and the usual pass-book was issued to the plaintiffs. The plaintiffs forwarded to the defendants at Bombay a list of the officers authorised to sign for the plaintiffs and specimen signatures of such officers, including the signature of the manager of the plaintiffs' Amritsar branch, Madho Ram. Madho Ram had previous to his appointment as manager of the Amritsar branch acted on occasion as the manager of the Lahore office of the plaintiffs. Thereafter the head office and the various branches of the plaintiffs operated on the said account by drawing drafts on the defendants in Bombay payable to order.

In the course of business between the plaintiffs and the defendants it was the custom of the plaintiffs when drawing a draft on the defendants to send to the defendants a letter of advice of such draft. The drafts were in each case signed by the manager and also by the accountant of the branch drawing them.

(1) (1873) 27 L. T. 849
(2) (1863) 32 L. J. Exch. 273.
(3) [1907] 2 K. B. 785 at p. 753.
(4) (1878) 3 Q. B. D. 525.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

It was the habit of the said Madho Ram when acting as manager of the plaintiffs' office at Lahore and afterwards as manager of the plaintiffs' branch at Amritsar to leave blank drafts and letters of advice signed by him with the accountant during temporary absences from the office to be filled in if needed. The said blank drafts and letters of advice were not destroyed on the return of Madho Ram, as they were stamped with a one anna stamp.

On or about the 2nd of October 1905 a letter of advice was received by the defendants in Bombay purporting to come from the Amritsar branch of the plaintiffs and to be signed by Madho Ram and by the accountant of that branch advising that a draft for Rs. 10,000 had been drawn by that branch in favour of one Nehalchand and on that date a draft for Rs. 10,000 purporting to be drawn by Madho Ram and to be also signed by the accountant in favour of Nehalchand or bearer was presented to the defendants for payment in Bombay and the amount of the draft was paid by the defendants. The defendants entered the payment of Rs. 10,000 in the plaintiffs' pass-book and sent the pass-book to the plaintiffs.

The plaintiffs repudiated the said draft and declared that the draft and the letter of advice were forgeries and filed the present suit to recover from the defendants the sum of Rs. 10,000 and interest.

The defendants in their written statement refused to admit that the draft and letter of advice were forgeries and in the alternative said that the payment of the draft if it were a forgery was caused by the plaintiffs' negligence.

The suit was heard by Russell, J. and at the trial evidence was given which made it appear probable that the draft and the letter of advice were documents which had been signed by Madho Ram in blank and left by him with the accountant on one of his absences from the office.

The learned Judge dismissed the plaintiffs' claim on the following grounds :—

The conclusion I have come to is that Exhibit B had been signed in blank by Madho Ram and used by the forgers for the purpose for which it was used.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED

No doubt two men Diranchand and Ishwardas have been convicted and sentenced for forgery of the Multan draft as well as of Exhibit B. But it is obvious that the signature and the initials (other than the initials to the word "bearer,") to Exhibit B may be the genuine ones of Madho Ram and the rest of the document a forgery.

Supposing my conclusion to be well-founded, how does the matter stand in law? Looking at the duty imposed on a banker to obey the mandate of his customer on a document such as the one in question, there is, if I may so express it, a correlative duty whereby a customer may be told *sic utere manu tua ut alienum non lædas*, and when Madho Ram signed papers of the Bank which though not perhaps filled in in any particular were really bank drafts, he was acting in such a way as to injure the banker who honoured the draft when filled in. Mr Raikes very ingeniously argued that the draft though signed by Madho Ram had no drawee or payee mentioned in it and therefore could not be described as a cheque, but in my opinion that, as I show hereafter, seems to be against his clients. Putting Madho Ram's name to it enabled any person into whose hands it fell to fill in the payee and drawee and made it a perilous thing for him to do This seems to me to distinguish the present case from *Scholfield* v. *Earl of Londesborough*(1) and *Colonial Bank of Australasia, Limited* v *Marshall*(2) for in those cases the instruments when drawn originally were complete and the subsequent additions unauthorised, whereas here the document was one which could be and was completed to the damnification of the defendants' bank. The principles applicable to the present case are those stated by Lord Halsbury in *Bank of England* v. *Vagliano Brothers*(3). "Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal: see *Ireland* v. *Livingston*(4)." That principle seems to me to be directly applicable to the present case, for there the agent was misled into paying the draft by the default of the principal in drawing it in blank. But here I hold that the plaintiffs' agent by a voluntary act of his own in signing blank document gave credit and the certification of its genuineness when filled up Here the very thing which the defendants did was induced by the default of the plaintiffs' agent, and it will be noticed that Lord Halsbury says that he designedly avoided calling these documents, bills of exchange because they were nothing of the sort, but if they had got into the hands of an innocent owner of value without notice Vagliano would have undoubtedly been responsible for them for he had given them a genuineness as against himself by accepting them. So here Madho Ram gave Exhibit B genuineness as against the plaintiffs by his signature thereto. Again

(1) [1896] A. C. 514.
(2) [1906] A. C 559.
(3) [1891] A. C 107 at p. 111.
(4) (1871) L. R 5 H. L. 395

Lord Macnaghten, at page 159, says: "If A. employs B on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertance or otherwise, introduces among the articles with which B is to deal a dangerous counterfeit not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment. And it cannot, I think, make any difference that B is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article." In the present case Madho Ram introduced amongst the drafts with which the defendants had to deal a document dangerous to the defendants because the body of it could be filled in above his genuine signature to their detriment.

After having referred to all the cases which were mentioned to me I am of opinion that this statement in *Hart on Banking*, 2nd Edition, page 293, is correct, where he says: "As between a customer and his banker who is his mandatory, a duty on the part of the customer arises directly out of contractual relations subsisting between them to take care that any cheque which he should buy is not in such a form as to offer facilities for an alteration which would mislead the banker if reasonably vigilant." Substitute for the words "for an alteration" the words "for being filled up" and you have the present case. Mr. Raikes argued that *Young* v. *Grote*(1) had been overruled by reason of the decisions in *Scholfield* v. *Earl of Londesborough*(2) and *Colonial Bank of Australasia, Limited* v. *Marshall*(3) and referred to a passage in the Laws of England to that effect. But in Hart on Banking, 2nd Edition, *Young* v. *Grote*(1) is certainly not treated as overruled, and however much it may have been criticised I do not feel justified in saying that it has been overruled, and moreover it appears to me that there must be a distinction between drawing an instrument in blank and putting your signature to a document which is capable of being converted into an instrument. Madho Ram when he signed Exhibit B on the plaintiffs' paper must have known that he was authorising any person into whose hands that paper came to fill it up so as to make it an instrument. In *Young* v. *Grote*(1), *Scholfield* v. *Earl of Londesborough*(2) and *Colonial Bank* v. *Marshall*(3), the documents were instruments when they left the hands of the drawer or acceptor, and he need not, it may be, have been obliged to take precautions against any alteration of the instrument he had prepared (of course in *Young* v. *Grote*(1) the husband was held liable because he entrusted blank cheques to his wife) and this is what I think the remarks of Lindley, L. J., in *Adelphi Bank* v. *Edwards*(4) quoted in *Scholfield's case* at page 510 *et seq.* must be limited to, when he says "we cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negotiable instrument, so that somebody else can tamper with it. I cannot go that length. I think it would be wrong." That it seems to me is a very different thing from saying that it is negligence to sign a document which somebody else may convert into a

(1) (1827) 4 Bing. 253.
(2) (1896) A. C. 514.
(3) [1906] A. C. 559.
(4) (1891) 26 S. L. J. 502.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

No doubt two men Divanchand and Ishwardas have been convicted and sentenced for forgery of the Multan draft as well as of Exhibit B. But it is obvious that the signature and the initials (other than the initials to the word "bearer,") to Exhibit B may be the genuine ones of Madho Ram and the rest of the document a forgery.

Supposing my conclusion to be well-founded, how does the matter stand in law? Looking at the duty imposed on a banker to obey the mandate of his customer on a document such as the one in question, there is, if I may so express it, a correlative duty whereby a customer may be told *sic utere manu tua ut alienum non lædas,* and when Madho Ram signed papers of the Bank which though not perhaps filled in in any particular were really bank drafts, he was acting in such a way as to injure the banker who honoured the draft when filled in. Mr Raikes very ingeniously argued that the draft though signed by Madho Ram had no drawee or payee mentioned in it and therefore could not be described as a cheque, but in my opinion that, as I show hereafter, seems to be against his clients Putting Madho Ram's name to it enabled any person into whose hands it fell to fill in the payee and drawee and made it a perilous thing for him to do This seems to me to distinguish the present case from *Scholfield* v. *Earl of Londesborough*(1) and *Colonial Bank of Australasia, Limited* v *Marshall*(2) for in those cases the instruments when drawn originally were complete and the subsequent additions unauthorised, whereas here the document was one which could be and was completed to the dammification of the defendants' bank. The principles applicable to the present case are those stated by Lord Halsbury in *Bank of England* v. *Vagliano Brothers*(3). "Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal · see *Ireland* v. *Livingston*(4)." That principle seems to me to be directly applicable to the present case, for there the agent was misled into paying the draft by the default of the principal in drawing it in blank But here I hold that the plaintiffs' agent by a voluntary act of his own in signing blank document gave credit and the certification of its genuineness when filled up. Here the very thing which the defendants did was induced by the default of the plaintiffs' agent, and it will be noticed that Lord Halsbury says that he designedly avoided calling these documents, bills of exchange because they were nothing of the sort, but if they had got into the hands of an innocent owner of value without notice Vagliano would have undoubtedly been responsible for them for he had given them a genuineness as against himself by accepting them. So here Madho Ram gave Exhibit B genuineness as against the plaintiffs by his signature thereto. Again

(1) [1896] A. C. 514.
(2) [1906] A. C 559.
(3) [1891] A. C 107 at p. 114.
(4) (1871) L. R 5 H. L 395

having its principal office at Lahore. The defendants carry on business as bankers in Bombay.

In the month of November 1904 the manager of the plaintiffs' head office at Lahore made arrangements for the transfer to the defendants' Bank of the plaintiffs' balance with the Chartered Bank of India to be credited to the account of the plaintiffs with the defendants and to be drawn on by the plaintiffs' branches at Lahore, Karachi, Amritsar, Ferozepore, Rawalpindi, Peshawar and Hoti. At this time the Amritsar branch alone of the plaintiffs' offices had already a current deposit account with the defendants and it was arranged that the amount due at the foot of that account should be transferred to the general account opened in favour of the plaintiffs, so that there should be only one account of the plaintiffs' Bank with the defendants.

The plaintiffs used to supply to their various branches, books containing engraved forms of drafts with counterfoils for the same, similar to those contained in the book Exhibit G. The forms were all engraved as dated from Lahore, and it was the practice in branch offices when issuing drafts to strike out the word "Lahore" and substitute with a rubber stamp the name of the place in which the branch office was situate and the names of the drawees were filled in the drafts as the occasion might require.

In the month of May 1905, correspondence commenced between the defendants and the plaintiffs regarding the endorsements upon "Order Cheques" drawn by the plaintiffs on the defendants. The defendants complained that Order Cheques frequently came from the plaintiffs and their branches with endorsements in various languages unknown, and therefore asked for a letter of indemnity holding them free from all responsibility in the event of passing such cheques without any regular endorsements.

On the 6th of June 1905, the defendants gave notice that unless a letter of indemnity was returned duly signed, they would refuse all cheques endorsed in languages unknown to them.

In consequence of this decision, various cheques of the plaintiffs' branches were dishonoured by the defendants and

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

eventually on the 6th of October 1905 the plaintiffs gave the indemnity required by the defendants, undertaking to hold them harmless from all consequences with respect to Order Cheques wrongly endorsed in languages unknown to the defendants, in consideration of the defendants allowing the plaintiffs and all their branches to draw Order Cheques.

On an examination of their pass-book relating to their account with the defendants on or about the 17th of October 1905, the plaintiffs discovered that they had been debited by the defendants with a sum of Rs 10,000 paid by the defendants on the 2nd of October as being the amount of Amritsar draft No 16 of 1905 The Amritsar manager of the plaintiffs named Madho Ram on being communicated with stated that no such draft had been issued from his branch Correspondence then ensued, as a result of which the draft No 16 and an advice note purporting to relate thereto were sent to Lahore for inspection by the plaintiffs The plaintiffs then wrote a letter, dated the 2nd of December 1905, in which they stated that Madho Ram, the manager of the Amritsar branch, did not admit that the documents in question bore his signature and that it had been discovered in the course of an enquiry into another case of fraud committed at Multan that Madho Ram having gone on leave had left some blank advices and drafts duly signed with the accountant who made them over to the daftari and that the manager on his return was told that the blank advices had been destroyed

On the 9th of February 1906, in acknowledging the correctness of the balance of their current account as advised by the defendants, the plaintiffs added a note to the admission in the following terms, "Subject to our claim as to the draft of Rs. 10,000 cashed fraudulently on the 2nd of October 1905 which is under Police investigation," and on the 1st of March 1906 they informed the defendants' Bank that they were unable to sign any acknowledgment of the balance without this qualification.

On the 29th of September 1908, the plaintiffs filed this suit against the defendants claiming payment of the sum of Rs.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

10,000 with interest on the ground that their current account had been improperly debited with that sum. The suit is thus for money had and received by the defendants for the use of the plaintiffs

The defendants rely upon the signatures purporting to be those of Madho Ram, the Amritsar manager, appearing upon the draft for Rs. 10,000, Exhibit B, and upon the advice note, Exhibit A. The signatures admittedly bear an extraordinary resemblance to the genuine signatures of Madho Ram and he has himself admitted that he would have been deceived by them. I also infer from the correspondence already referred to that the plaintiffs themselves were doubtful whether the documents in question were not signed by Madho Ram. The learned Judge in the Court below has held that the draft, Exhibit B, was signed by Madho Ram on the occasion of one of his departures from Amritsar during the period of his managership there and that the draft had subsequently been filled in by forgers, the forgers being, in his opinion, two men Devanchand and Ishwardas who were committed and sentenced for forgery of another draft of the plaintiffs' Bank The learned Judge being of opinion that the plaintiffs had been guilty of negligence in the discharge of their duty to the defendants which arose out of the relation of banker and customer, passed a decree in favour of the defendants dismissing the suit.

Neither the pleadings nor the issues directly raise the question of negligence in respect of a blank draft bearing a genuine signature but both in the lower and in this Court much of the evidence and arguments were devoted to this question.

I am of opinion that the learned Judge came to the right conclusion in holding that the signature upon the draft, Exhibit B, was the genuine signature of Madho Ram, for the considerations, to which the plaintiffs' expert Mr. Hardless has called attention, do not raise any serious doubt in my mind upon the point. The fact, however, that the genuine signature of Madho Ram appears upon a draft which *ex hypothesi* was blank at the time the signature was affixed, is not, I think, for reasons which I will state later on, sufficient of itself to prejudice

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

the plaintiffs' claim. We must be convinced that there was some negligence on the part of their servants which was the proximate cause of the cashing of the draft by the defendants.

It is, therefore, necessary to scrutinize the evidence in order to try and arrive at some certain conclusion as to when Exhibit B was signed by Madho Ram. It is admitted that the draft is made out upon one of the plaintiffs' draft forms. A comparison however of Exhibit B with the counterfoils in the books of forms in use consecutively from 1903 to 1906 at the Amritsar branch, and with such of the drafts appertaining thereto as have been produced convinces me that Exhibit B did not come from one of those books.

Madho Ram states that he has been in the plaintiffs' service for eight years altogether and that he has been the manager at Amritsar since the 24th of April 1904.

We find that from the 7th of May in that year up to October 1905 he has initialled almost all the counterfoils of drafts issued from the Amritsar branch with the initials "M. R M. C." He states that before he went to Amritsar, he had occasionally acted as manager at Lahore, when the Lahore manager was ill; that on one occasion he was the manager for one and a half months in 1903 or 1904 and that once or twice he signed the Bank's drafts in blank at Lahore when he was acting as manager and had to go to Court.

We have, therefore, examined the counterfoils of the only Lahore draft form book which has been produced, namely, Exhibit 14, for the purpose of seeing whether it throws any light on the question which we have to determine. The counterfoils in that book show that every counterfoil existing from the 19th of March to the 21st of April 1904 is initialled by Madho Ram, except in the case of a counterfoil bearing date the 30th of March. An examination of that book also discloses the fact that a counterfoil of a draft has been torn out from a place between the counterfoils dated the 15th of April and the 16th of April 1904, and Exhibit B is found to be of the same quality of paper as the counterfoils in that book and to fit exactly on to those counterfoils not only in respect of the

width of the paper but also in the matter of ornamental scroll work. This is the only case we have been able to find of a counterfoil which has been torn out during a period when Madho Ram was initialling the counterfoils in the books produced.

I will now consider whether there is any other reason for supposing that the draft, Exhibit B, may have been signed by Madho Ram at Lahore. In the first place it is to be noted that the ink of the signature is very faint, much fainter than the ink of the other manuscript portions of the draft. This would be consistent with the theory that Madho Ram's signature was affixed early in 1904, while the fraudulent filling in of the other portions of the draft was not effected until the latter part of 1905 It is also to be noted that the year date on Exhibit B is indicated by a " 5 " which has obviously been altered from some other figure by a person who was anxious to destroy all evidence of the original figure. This would indicate that the original year date was not inserted in 1905. In this connection it is also to be noticed that on the counterfoils contained in the book, Exhibit 14, during the period when Madho Ram was initialling the counterfoils, (for example, on the counterfoil of the 16th of April 1904), the figure 4 is written in such a way as to suggest the possibility of its alteration into a 5 by a thickening of the lines and the addition of a tail similar to that in the 5 which we find in Exhibit B. This suggests the inference that Madho Ram, at the time of affixing his signature in blank, took the precaution of adding the year date.

Another material fact in this connection is that it is proved that the fraudulent endorsement upon Exhibit B in the name of an unknown person Nehalchand is in the handwriting of Divanchand who was a clerk in the plaintiffs' Bank at Lahore at the time when Madho Ram was engaged there as an accountant and who subsequently became an accountant in the Multan branch of the plaintiffs' Bank and was convicted of forgery in respect of a draft drawn upon the Multan branch dated the 25th of October 1905 and purporting to be signed by Madho

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

the plaintiffs' claim. We must be convinced that there was some negligence on the part of their servants which was the proximate cause of the cashing of the draft by the defendants.

It is, therefore, necessary to scrutinize the evidence in order to try and arrive at some certain conclusion as to when Exhibit B was signed by Madho Ram. It is admitted that the draft is made out upon one of the plaintiffs' draft forms. A comparison however of Exhibit B with the counterfoils in the books of forms in use consecutively from 1903 to 1906 at the Amritsar branch, and with such of the drafts appertaining thereto as have been produced convinces me that Exhibit B did not come from one of those books

Madho Ram states that he has been in the plaintiffs' service for eight years altogether and that he has been the manager at Amritsar since the 24th of April 1904.

We find that from the 7th of May in that year up to October 1905 he has initialled almost all the counterfoils of drafts issued from the Amritsar branch with the initials "M. R. M. C." He states that before he went to Amritsar, he had occasionally acted as manager at Lahore, when the Lahore manager was ill; that on one occasion he was the manager for one and a half months in 1903 or 1904 and that once or twice he signed the Bank's drafts in blank at Lahore when he was acting as manager and had to go to Court.

We have, therefore, examined the counterfoils of the only Lahore draft form book which has been produced, namely, Exhibit 14, for the purpose of seeing whether it throws any light on the question which we have to determine. The counterfoils in that book show that every counterfoil existing from the 19th of March to the 21st of April 1904 is initialled by Madho Ram, except in the case of a counterfoil bearing date the 30th of March. An examination of that book also discloses the fact that a counterfoil of a draft has been torn out from a place between the counterfoils dated the 15th of April and the 16th of April 1904, and Exhibit B is found to be of the same quality of paper as the counterfoils in that book and to fit exactly on to those counterfoils not only in respect of the

It is in the following form :

Advice of drafts drawn by the Panjab National Bank, Limited.
Answered.
Received.
on the
Mercantile Bank of India, Limited, Bombay.

No.	Date		In favour of	Amount.	Remarks.
	1905				
16/1905.	Sept.	29	Lala Nehal Chand	10,000	On Demand
			Rupees ten thousand only.		
					Pd. 2-10-05.
Note.					
This draft has been drawn payable to "bearer" which please pay accordingly.					

Panjab National Bank, Ltd., Amritsar.
The 29th day of September 1905.

UTTAM CHAND, K. MADHO RAM, M. C.
Accountant. *Manager.*

On its face it is a representation that draft No. 16 of the 29th September 1905 has been drawn by the plaintiffs on the defendants and should be paid. The signature of Madho Ram appearing upon it is admitted to be remarkably like his true signature. We have compared it with a very large number of his admitted signatures and except for the absence of the usual concluding back flourish we can detect no point in which it is not exactly similar to many of his other signatures. The concluding back flourish is so characteristic that a forger could not omit it; for example, in the initials on Exhibit B we have several lame attempts to imitate it. We have discovered

1911

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

Ram. There is no doubt cogent evidence that Exhibit B was prepared for issue by some person or persons who had knowledge of the transactions of the Amritsar branch, for it bears the serial No 16 of 1905 which is the proper serial number according to the Amritsar Draft Issue Register for a draft drawn upon the defendants on the 29th of September 1905; it is also stamped with a rubber stamp "Amritsar" which must have been provided by some one who had access to the stamps used at that branch. The conclusion, however, that employees of the Lahore and Amritsar branches were conspiring together, raises no difficulty, for, as is well-known, Amritsar is but at a short distance from Lahore and within easy reach by train.

I am satisfied that the draft Exhibit B was never prepared for issue by Madho Ram, because I think it is quite clear that the initials appearing in various places upon that draft are forgeries. We have some hundreds of Madho Ram's genuine initials for comparison and we have noticed no case but one in which his initials do not conclude with a continuing back stroke or flourish which the writer of the initials upon Exhibit B has failed to reproduce successfully. If the draft form had been signed for issue from Lahore in April 1904 there would be no alterations which would require initialling. The falsity of the initials, therefore, supports the conclusion that the form B was signed at Lahore before 1905.

I also think that it is safe to conclude that the draft was prepared for issue at a time when it was known to the servants of the plaintiffs that the defendants had refused to honour any order draft with an endorsement in a language unknown to them unless they received a general indemnity in respect of such drafts from the plaintiffs. That indemnity, as we have seen, was not given until the 6th of October I, therefore, infer that Exhibit B was prepared for issue some time between May and October 1905, while the correspondence upon the subject of endorsements on order drafts was proceeding.

I now turn to the question of the genuineness of the advice note, Exhibit A, upon which the defendants rely.

It is in the following form :

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

Advice of drafts drawn by the Panjab National Bank, Limited.
Answered.
Received.
on the
Mercantile Bank of India, Limited, Bombay.

No	Date.		In favour of	Amount.	Remarks.
	1905				
16/1905.	Sept	29	Lala Nehal Chand	10,000	On Demand
			Rupees ten thousand only.		
					Pd. 2-10-05.

Note.

This draft has been drawn payable to "bearer" which please pay accordingly.

Panjab National Bank, Ltd., Amritsar.
The 29th day of September 1905

UTTAM CHAND, K. MADHO RAM, M. C.
Accountant. *Manager.*

On its face it is a representation that draft No. 16 of the 29th September 1905 has been drawn by the plaintiffs on the defendants and should be paid. The signature of Madho Ram appearing upon it is admitted to be remarkably like his true signature. We have compared it with a very large number of his admitted signatures and except for the absence of the usual concluding back flourish we can detect no point in which it is not exactly similar to many of his other signatures. The concluding back flourish is so characteristic that a forger could not omit it; for example, in the initials on Exhibit B we have several lame attempts to imitate it. We have discovered

1911.

PANJAB NATIONAL BANK, LIMITED *v.* MERCANTILE BANK OF INDIA, LIMITED.

in the draft register p. 13 (Exhibit 4) an instance in which the concluding 'C' wants the flourish and presents an appearance exactly similar to the concluding 'C' of Madho Ram's signature on Exhibit A. In the absence then of any mark of a certain differentiation and in view of the admissions of Madho Ram, the evidence of the defendants' witnesses and the clumsiness of the forgery of Uttamchand's name in Exhibit A and of the initials in Exhibit B, the conclusion of the Court is that Madho Ram did put his signature to the paper Exhibit A.

The next question is, when did he put his signature on that paper?

It is clearly established that when Madho Ram signed draft forms in blank he would have to sign also blank letters of advice as the letter of advice always goes out with the draft. Anandrao Ganpatrao, the defendants' ledger clerk, illustrates the importance of this practice in describing the procedure when Exhibit B was presented at the defendants' Bank. He says:

"In ordinary course it would be brought to me before it was paid. My duty was to see the signatures and compare them with the specimen signatures on our office record. I put the draft in my ledger and enter the folio; *then I see if we have got advice from the Panjab Bank.*"

It is, I think, established that Exhibit A is not one of the blank advice notes signed by Madho Ram when he went on leave early in October 1905. He says he signed them at the last moment and was working in office till the 3rd October. The latter statement is proved from the plaintiffs' books. The draft Exhibit B was cashed by the plaintiffs in Bombay on the 2nd October and they had already received the advice note Exhibit A. I infer therefrom that it was filled in and posted in the Panjab prior to the 1st of October. The witness Uttamchand, who was the plaintiffs' accountant at Amritsar in September and October 1905 and has been dismissed from their service, states that when Madho Ram went on leave in October 1905 he left with him four drafts in a book which were signed in blank. Besides drafts he also left four advice forms which he had signed. None of the drafts were used during his absence. When he returned he asked if they had been used. Uttamchand said,

"not any," and handed back the drafts. Madho Ram also asked for the letters of advice and Uttamchand said they had been destroyed. This confirms the statement of Madho Ram that he inquired for the advice notes but was told by his subordinates they had been destroyed He says his practice was always to ask for the blank advice notes and drafts on his return from a temporary absence.

I have already indicated my opinion that he did not recover a blank draft form signed by him at Lahore in April 1904. He may have omitted to do so on account of his impending departure for Amritsar in that month to take up the office of manager there. It is equally probable that he omitted to recover the advice note which must according to the usual practice have been signed in blank to meet the occasion of his temporary absence in April. This appears to me the most probable explanation of the existence of A and B in a blank state except for Madho Ram's signatures and capable of being abstracted and used by fraudulent persons. Uttamchand has shown that the fraudulent completion of Exhibits A and B may have been effected at the Lahore office. Employees in the Lahore office would know the number of the last preceding Amritsar draft on the defendants' Bank and would know perhaps better than those in Amritsar the position which the question of Order drafts on the defendants likely to bear vernacular endorsements had arrived at at the end of September 1905.

To summarise my conclusions of fact, I find that Exhibit B was not signed by Madho Ram, when he was the manager at Amritsar but that it and probably the advice note Exhibit A were signed by him at some earlier date than the 24th of April 1904, when he took up the position of manager at Amritsar; that Exhibits A and B were probably signed on or about the 15th of April 1904 when he was employed in the Bank at Lahore (Exhibit B being dated 1904) and left at the Bank to be filled in and issued by his subordinates in case of need during his temporary absence; that it was fraudulently filled in by Divanchand, possibly in concert with servants of the

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

Bank at Lahore and Amritsar; that the signed draft form must have come into the possession of Divanchand by theft or fraud and that Madho Ram never gave any authority to anyone to prepare the blank form signed by him for issue as a draft of the Amritsar branch or of the year 1905.

I will now consider whether upon the facts found the plaintiffs are estopped from contending that the completed draft presented to the defendants was not the draft of the plaintiffs.

In deciding the case we must apply the law contained in section 115 of the Indian Evidence Act with the aid of such English cases as are not inconsistent with it. Have then the plaintiffs through their agent Madho Ram by declaration, act or omission intentionally caused or permitted the defendants to believe that a draft in terms of Exhibit B had been drawn by Madho Ram on the defendants?

I do not think in view of the evidence that the draft forms when signed in blank were left with the accountant under lock and key and that Madho Ram as a rule asked for the documents which had been signed in blank on his return to duty and in the absence of any suggestion that any similar case of fraud had occurred in connection with such documents prior to September 1905, that the plaintiffs can be held to have authorised any negligence in practice which was likely to result in a fraud such as has occurred.

It was not incumbent upon the plaintiffs or Madho Ram as their agent to contemplate the perpetration of such a fraud or to guard against it. As observed by Bovill, C. J., in *Société Générale* v. *The Metropolitan Bank*[1]—

"Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of parties in excluding all possibility of committing it."

The learned Judge in the lower Court held that the principles applicable to the present case are those stated by Lord Halsbury in *Bank of England* v. *Vagliano Brothers*[2], *viz.*, that a principal who has misled his agent into doing something on

(1) (1873) 27 L. T. 849 at p. 856. (2) [1891] A. C. 107 at p. 114

his behalf which the agent has honestly done would not be entitled to claim against the agent in respect of the act so done. In *Vagliano's case*, the Bank of England were agents who had, by special agreement, undertaken the duty of paying their principal's acceptances, and the acceptances by Vagliano introduced fraudulent counterfeits for payment which Vagliano ought to have detected. There was, therefore, negligence in the transaction itself which was the proximate cause of the loss; there was an intention in Vagliano to induce the belief and action of the Bank with regard to those very documents In the present case the facts do not show that the negligent act alleged was the proximate cause of the loss. The act of Madho Ram in signing a blank form with intent that it might be used in case of need for a Lahore draft upon any of those who, in April 1904, were bound to honour the plaintiffs' Lahore drafts, does not disclose any intention that the defendants should believe anything or take any action; it creates a position similar to that which arose in *Swan* v. *North British Australasian Company*(1), where a blank transfer form signed by the plaintiff for the transfer of shares in one Company but fraudulently filled in and used by his broker for transfer of the plaintiff's shares in another Company was held not to be the proximate cause of the transfer of the shares by that other Company so as to estop the plaintiff from contending that he had never transferred his shares. There are, however, dicta of certain Judges in that case (Blackburn, J., Byles, J., and Cockburn, C. J.) which suggest that in the case of negotiable instruments a more stringent rule is enforceable against the maker. It is to be observed that Chapter VIII of the Indian Evidence Act which deals with estoppels recognises no special rule for negotiable instruments beyond that laid down in section 117 with regard to the acceptor of a Bill of Exchange, a position which Madho Ram does not occupy in relation to Exhibit B. The English Law upon the point has been summarised by Fletcher Moulton, L. J., in *Smith* v. *Prosser*(2), as follows:

(1) (1863) 32 L. J. Ex. 273 (2) [1907] 2 K. B. 735 at p. 751

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

"Both the common law and the statute realised the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They therefore drew the line as regards the protection of third parties in the following very reasonable and intelligible way if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi*, and he would therefore not be liable for the act of a bailee who turned the document into a negotiable instrument."

This is not a case in which at the date of the signature there was any relation of banker and customer subsisting between the plaintiffs' Lahore branch and the defendants. It is, therefore, unnecessary to consider whether as between banker and customer the statement of the law by Fletcher Moulton, L. J., requires any qualification Here I infer that there was never any intention that the form B bearing Madho Ram's signature should be issued as a draft from any place but Lahore, and we know that the defendants had only been authorised at a later date to honour drafts bearing Madho Ram's signature if drawn by the Amritsar branch. This circumstance was relied upon by counsel for the plaintiffs who argued if the Court held that Madho Ram signed Exhibit B while manager at Lahore, the relation of banker and customer not being then established between plaintiffs and defendants, the case would be governed by the decisions in *Baxendale* v. *Bennett*(1) and *Smith* v. *Prosser*(2). *Smith* v. *Prosser*(2) establishes that the signing of a paper in blank and its delivery to an agent with instructions to fill it in and negotiate it under certain specified conditions will not estop the signer from repudiating liability if the agent in the absence of the specified conditions fraudulently fills it in and negotiates it. *Baxendale* v. *Bennett*(1) establishes that the preservation by the acceptor without cancellation of a

(1) (1878) 3 Q. B. D. 525. (2) [1907] 2 K. B. 735.

blank acceptance after the occasion for its use has passed will not render him liable if it is stolen, filled in and negotiated fraudulently. I infer also from the remarks of Lord Halsbury and Lord Shand in *Clutton* v. *Attenborough & Son*[1] that even in the case of a completed cheque the *animus emittendi* must be shown in order to bring home liability to the maker.

The facts which I hold to be established do not bring this case within the estoppel which has been held to arise where the maker of a completed instrument completes it in a negligent manner and voluntarily parts with it and it is fraudulently altered by the person to whom it is handed. *Young* v. *Grote*[2], which is the best known case in this connection, was much relied upon by counsel for the respondents, but the facts found do not admit of its application any more than the application of section 89 of the Negotiable Instruments Act which appears to be based in part upon *Young* v *Grote*[2]. Exhibit B had not been made into a cheque by Madho Ram nor had he voluntarily parted with it in order that it might be made into a cheque *Ingham* v *Primrose*[3], also relied upon by counsel for the respondents, does not assist their case, for, as explained by Lord Watson in *Scholfield* v *Earl of Londesborough*[4], the acceptor there was found liable not because he had signed a bill which facilitated fraud but upon the obvious consideration that he had negligently put into circulation a negotiable instrument which had not been properly cancelled. It is most unfortunate that the documents Exhibits A and B were left uncancelled, but I can find no warrant in law for holding the plaintiffs estopped from asserting the true facts because eighteen months after Madho Ram's departure from Lahore the documents were fraudulently completed by Divanchand and presented to the defendants as documents issued by Madho Ram at Amritsar.

We reverse the decree of the lower Court and give judgment for the plaintiffs for Rs. 10,000 with interest at 6 per cent. per annum from the 2nd of October 1905 and costs.

(1) [1897] A. C. 90.
(2) (1827) 4 Bing. 253.
(3) (1859) 7 C. B. (N. S.) 82.
(4) [1896] A. C. 514 at p. 534.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

BATCHELOR, J. :—In the suit out of which this appeal arises the plaintiff Bank claimed a sum of Rs. 10,000 which had been paid out by the defendant Bank on a draft purporting to bear the signature of one Madho Ram, the plaintiffs' manager. The plaintiffs' case was that the draft was a forgery, and that the defendants were not entitled to debit their customers, the plaintiffs, with the sum paid out in consequence of the forgery.

The defendants in their written statement denied that the draft in question was a forgery and set out their belief that the manager Madho Ram's signature on it was his genuine signature, they denied that they had been guilty of any negligence, and contended that, even if Madho Ram's signature was forged, they were entitled to debit the plaintiffs with the payment, the making of which was wholly due to the plaintiffs' negligence.

On the issues at the trial the learned Judge held that the plaintiffs had failed to prove that the draft for Rs. 10,000 did not bear Madho Ram's genuine signature; that, having regard to the signatures and wording appearing on the draft, the defendants were justified in making payment of it to bearer; and that in making such payment the defendants did not act without proper care and caution, and were not guilty of negligence. On these findings the learned Judge dismissed the suit with costs, and from that decree the plaintiffs bring the present appeal.

It will be convenient first to ascertain what the facts are with reference to the preparation of the draft in question, and then to consider what is the law applicable to that state of facts.

The first and principal question of fact is whether the manager Madho Ram's signature is genuine or forged, and on this point I cannot doubt but that the learned Judge was right in finding that the signature is genuine. As to the degree of its resemblance to a genuine signature it is enough to refer to Madho Ram's own admission that he himself would have paid on such a signature. Upon careful examination *in a photo-*

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

graphic enlargement the writing is free and flowing, without any discernible trace of tremor, hesitation or fabrication. There is no difficulty in supposing that the signature is genuine, for Madho Ram has admitted that it was not unusual for him, when about to absent himself from office for a few days, to leave blank signed drafts with the accountant in order that they might be duly completed if need arose during Madho Ram's absence. The defendants' case is that the draft now in suit, Exhibit B, was one of the drafts so signed and left behind by Madho Ram, who neglected to recover or destroy it, and that it was afterwards stolen and used by the forgers who filled in the other entries and secured payment from the defendants: that is the case which the learned Judge below has held proved, and I agree with him in this finding. The principal witness called by the plaintiffs on this point was the handwriting expert, Mr. Hardless, but his evidence appears to me to depend so much on abstract and somewhat far-fetched theory that it would not be safe to give effect to his conclusions. It is plain, moreover, that the theory of a tracing, on which alone he took his stand at the trial, did not occur to him till a comparatively late stage in his investigations, and was even then suggested to him by other persons; and in my opinion his evidence generally has been very materially shaken in cross-examination. On the other hand we have the evidence of Messrs. Marshall and Johnston, who depose that the signature is, in their opinion, genuine, and whose testimony seems entitled to all the greater credit that these gentlemen are not mere theorists, but practical banking men, upon whose discrimination and sagacity in such matters large sums of money do in daily practice depend. Further, among the correspondence put in as Exhibit E, will be found plaintiffs' letter to the defendants, dated 2nd December 1905, which may be taken as the first statement by the plaintiffs of their case. It is, I think, impossible to read that letter without recognising that it was the plaintiffs themselves who first suggested the theory that the origin of the fraud lay in the fact that draft forms bearing his genuine signature were sometimes left by Madho Ram in the office. It may also be observed that Madho

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

Ram's signature on Exhibit B is written in much fainter ink than the other, that is, the forged entries in the draft, but if the signature had been forged, one would have expected the forgery to correspond in appearance with the other writing on the draft.

On the whole, then, I am satisfied that the onus which on this point admittedly lay on the plaintiffs has not been discharged; in other words, I find that Madho Ram's signature on Exhibit B is his genuine signature

It remains to consider the circumstances in which Exhibit B was signed by Madho Ram and was afterwards fraudulently completed. The draft is written on the plaintiff Bank's usual printed form, the address "Lahore" being struck out and replaced by the stamp "Amritsar." Madho Ram was manager of the plaintiffs' Amritsar branch from 24th April 1904, and before that date was at the Lahore office where he acted as manager from time to time. The plaintiffs' account with the defendant Bank was opened in November 1904 The fact to be ascertained is when and where Madho Ram signed Exhibit B, which was presented at the defendants' Bank and cashed on 3rd October 1905, was it signed at Amritsar while Madho Ram was manager there, or was it signed at Lahore prior to the establishment of business relations between the two litigating Banks? I am of opinion on the evidence that it was signed by Madho Ram some time in April 1904 when he was acting as manager of the Lahore office. We have in evidence Exhibit A 9, Exhibit 12 and Exhibit G which are the counterfoils of the draft form books of the Amritsar branch running from 19th June 1903 to 16th August 1905. Exhibit A 9 has the hundred complete counterfoils. In Exhibit 12 certainly one counterfoil is missing, but Exhibits C 1 to C 13 show the kind of printing and paper used in these drafts, and it is plain that Exhibit B was not taken from this book, Exhibit 12. It is similarly plain that it could not have come from the book, Exhibit G, where the forms are visibly distinct from the form of Exhibit B. These are the only relevant draft form books of the Amritsar office, and I think the plaintiffs have succeeded in proving that

Exhibit B cannot have been abstracted from any of them. As I understood the argument, this proposition was not seriously questioned by the Advocate General, who, however, strongly insisted that, since Exhibit B indisputably came from some book of the plaintiffs, it was the plaintiffs' duty to produce the book of origin, as indeed Madho Ram undertook to produce it; and that, this not having been consciously done, every presumption should be made against the plaintiffs. It may be that at the trial the question of the source of Exhibit B was somewhat lost sight of, but the plaintiffs produced all the books called for and nothing occurred which could debar them now from tracing its origin to any of the books on the record. I entirely agree with the Chief Justice that the real origin of Exhibit B is the Lahore draft form book for April 1904. This book has a counterfoil missing, and the forms correspond with Exhibit B in every detail, the size and texture of the paper, the character of the scroll and printing, and so on, nor is it suggested that any such correspondence can be found between Exhibit B and any other series of forms. This view receives much support from the fact that in Exhibit B, the date which now appears as "1905" was almost certainly at first written "1904," and the precise kind of "4" which has been converted into a "5" appears also in other counterfoils in this book. Finally, there is good reason for thinking that the word "Amritsar" stamped on Exhibit B was not impressed with the stamp actually in use at the Amritsar office.

As to Madho Ram's initials on Exhibit B, I think that they must be pronounced forgeries. The learned Judge below thought that the initials against "bearer" were forged, and that opinion seems beyond all reasonable criticism; yet if the initials against "bearer" are false, all the probabilities suggest that the other initials are also false.

As to the letter of advice, Exhibit A, it played but very little part in the argument before us We have, however, subjected it to careful scrutiny and examination, and I am satisfied that it bears the genuine signature of Madho Ram. Upon this finding the probabilities are, upon the evidence on the record that Exhibit A was signed by Madho Ram and left behind at

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

Ram's signature on Exhibit B is written in much fainter ink than the other, that is, the forged entries in the draft, but if the signature had been forged, one would have expected the forgery to correspond in appearance with the other writing on the draft.

On the whole, then, I am satisfied that the onus which on this point admittedly lay on the plaintiffs has not been discharged; in other words, I find that Madho Ram's signature on Exhibit B is his genuine signature.

It remains to consider the circumstances in which Exhibit B was signed by Madho Ram and was afterwards fraudulently completed. The draft is written on the plaintiff Bank's usual printed form, the address "Lahore" being struck out and replaced by the stamp "Amritsar." Madho Ram was manager of the plaintiffs' Amritsar branch from 24th April 1904, and before that date was at the Lahore office where he acted as manager from time to time. The plaintiffs' account with the defendant Bank was opened in November 1904. The fact to be ascertained is when and where Madho Ram signed Exhibit B, which was presented at the defendants' Bank and cashed on 3rd October 1905, was it signed at Amritsar while Madho Ram was manager there, or was it signed at Lahore prior to the establishment of business relations between the two litigating Banks? I am of opinion on the evidence that it was signed by Madho Ram some time in April 1904 when he was acting as manager of the Lahore office. We have in evidence Exhibit A 9, Exhibit 12 and Exhibit G which are the counterfoils of the draft form books of the Amritsar branch running from 19th June 1903 to 16th August 1905. Exhibit A 9 has the hundred complete counterfoils. In Exhibit 12 certainly one counterfoil is missing, but Exhibits C 1 to C 13 show the kind of printing and paper used in these drafts, and it is plain that Exhibit B was not taken from this book, Exhibit 12. It is similarly plain that it could not have come from the book, Exhibit G, where the forms are visibly distinct from the form of Exhibit B. These are the only relevant draft form books of the Amritsar office, and I think the plaintiffs have succeeded in proving that

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

after Madho Ram had signed Exhibit B; in other words, when he signed that paper, he owed no duty to the defendant Bank. In my opinion, however, it is by no means clear that this circumstance alone would suffice to exonerate the plaintiffs if in other respects they are liable, and I, therefore, deal with the case as if the plaintiffs were the defendants' customers at the time when Exhibit B was signed. On that footing there appears to be no doubt on the authorities that some duty or other was owing by the customers or their agent, Madho Ram, to the defendants, though, so far as I can ascertain, the Courts have not defined the precise nature or scope of the duty: see, for instance, *Colonial Bank of Australasia, Limited* v. *Marshall*[1] and *Scholfield's case*[2]. That some degree of carelessness is imputable to Madho Ram is, I think, indisputable. Whatever may be thought of his action in leaving a blank signed draft behind in the office, he was certainly negligent in not recovering it or verifying it that it had been put to the lawful use for which it was intended. The question is whether this is sufficient to deprive the plaintiffs of their money. With some reluctance and some uncertainty, I think the correct answer is that it is not sufficient. In order that Madho Ram's negligence should have this effect in law, it would, in my view, be requisite, first, that the negligence should have occurred in the very transaction itself, not in some collateral act, and, secondly, that the negligence should have been the proximate cause of misleading the defendant Bank. That, I understand, is the limit of the rule in *Lickbarrow* v. *Mason*[3] that where one of two innocent parties must suffer for the fraud of a third, that party should suffer whose negligence facilitated the fraud: see the observations of Lord Coleridge in *Arnold* v. *Cheque Bank*[4], and the excerpt there quoted from the judgment of Blackburn, J., in *Swan* v. *North British Australasian Co.*[5]; in the same sense are Lord Cranworth's dicta in *Orr & Barber* v. *Union Bank of Scotland*[6] and *British Linen Co.* v. *Caledonian*

(1) [1906] A. C. 559.
(2) [1896] A. C. 514.
(3) (1787) 2 T. R. 63.
(4) (1876) 1 C. P. D. 578 at pp 587, 588.
(5) (1863) 32 L. J. Exch. 273.
(6) (1851) 1 Macq. 513 at pp. 522-3.

1911.

PANJAB NATIONAL BANK, LIMITED v. MERCANTILE BANK OF INDIA, LIMITED.

tion, had been handed to Telfer (the agent) . . . for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument . . . the defendant would have been responsible to a *bonâ fide* holder for value; " but the defendant was exonerated because the note was given to Telfer not for issue but only for conditional issue on further instructions. The Lord Justice distinguished those cases where the instrument was parted with in complete state, and those cases where, being incomplete, it was delivered to an agent for the purpose of being negotiated. Fletcher Moulton, L. J., based his judgment on the facts that the agent had possession of the note merely as custodian, and that the defendant had never any '*animus emittendi*'. Both these judgments appear to me to be pertinent to the facts of the present case The draft, after signature by the plaintiffs' agent, was left by him in an incomplete state, no drawee or payee being mentioned; and the plaintiffs' agent had no '*animus emittendi*' except upon conditions which were never realised.

It was urged that this case and *Baxendale's case* had no present application because they were not cases, as this is a case, between banker and customer. This distinction, however, does not in my judgment, deprive the cited cases of their applicability though, no doubt, the relation between banker and customer is, for some purposes, materially different from the relation between the acceptor of a bill and a subsequent holder; here also it must be remembered that Exhibit B, when signed and left by Madho Ram, was not a cheque, but a mere inchoate draft capable of being completed into a cheque. It may also be observed that *Colonial Bank of Australasia, Limited* v. *Marshall*(1), though a case between banker and customer, was decided by the Privy Council expressly on the principles laid down in *Scholfield* v. *Earl of Londesborough*(2). In this last case Lord Halsbury, L. C., lays down the conditions upon which the banker is immune in these words (p. 523): "If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document by his act or

(1) [1906] A. C. 559. (2) [1896] A. C. 514.

neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled." It seems to me that, on the present facts, the defendants are beyond the reach of this principle, for Madho Ram was not guilty of any neglect of an act usual in the course of dealing between the parties, and the bankers were induced to pay, not directly by reason of any act or neglect of the plaintiffs, but by reason of the after-occurring forgery.

I feel that the case is a hard one for the defendants, who have acted throughout with due care and caution, while the *plaintiffs, through their agent, have certainly been guilty* of some carelessness; but the negligence is not, as I have said, sufficient, in my opinion, to render the plaintiffs liable upon this forged draft. I cannot regard it as amounting to negligence in Madho Ram that he signed the draft form and the letter of advice and left them with the accountant for conditional issue As to the non-recovery of them, the evidence is that his habit was either to recover such documents after his return from leave or to accept the assurance of his subordinates that they had been issued or destroyed · in the particular case of Exhibits A and B it is probable, upon the evidence, that Madho Ram overlooked them on the occasion of his intending transfer from Lahore to Amritsar. The crime took place eighteen months later, and was, in my judgment, the only proximate cause of the deception practised on the defendants.

For these reasons I agree that the appeal should be allowed.

Attorneys for the appellants: *Messrs. Payne & Co.*

Attorneys for the respondents: *Messrs. Crawford, Brown & Co.*

Decree reversed

H. S. C.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911.
July 25.

KANJI DWARKADAS *v.* HARIDAS PURSHOTTAM.*

Insurance—Marine insurance—Insurable interest of agent in goods of principal—Effect of a Mahajan's " Majur *"—Local custom when enforced—Duties and rights of insurer and policy-holder in case of total loss.*

The plaintiffs, as commission agents, shipped certain goods on behalf of constituents on board the ship "*Ali Madut*" in the year 1899. The plaintiffs were instructed by their principals to insure these goods and accordingly by a policy dated February 7th, 1899, the plaintiffs insured the goods with the defendants, subject, as stated in the policy, to the custom of the port of Cutch Mandvi.

The ship "*Ali Madut*" was wrecked off the coast of German East Africa and the wreck and the remains of the cargo were sold by the local authorities and the proceeds handed over to the owner of the vessel.

The plaintiffs sued the defendants to recover Rs. 3,500 as the value of the goods.

The defendants, besides certain other objections to the plaint, objected *that the* plaintiffs as agents had no insurable interest in the goods; that by the *custom of* the port of Cutch Mandvi the claim of the plaintiffs could not be established without the production of a Mahajan's "*Majur*", and that the *defendants were in any event entitled to credit for the sale proceeds of the wreck and cargo.*

Held, that an agent who has authority from his principals, express, implied or ratified, can effect insurances on the goods of his principals; that the custom of the port of Cutch Mandvi must be construed in a reasonable manner and that under it a Mahajan's "*Majur*" could not be required in the case of total loss; that the policy-holder's duty was only to give intimation of total loss, at the earliest possible opportunity to the insurer, and that it was for the insurer to protect his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo.

Ransordas Bhogilal v. Kesrising Mohanlal(1), referred to.

THE plaintiffs, as commission agents for certain Borah merchants, shipped certain goods on board the *ganjo* or native ship "*Ali Madut*" and, at the instruction of their principals, insured the goods with the defendants for the sum of Rs. 3,500. The policy stated that the insurance was subject to the local custom prevailing at the sea-port town of Cutch Mandvi. The ship was wrecked off the coast of East Africa and the wreck and the remains of the cargo were sold by the local authorities and the sale proceeds paid to the owner of the vessel.

* O. C. S. Suit No. 9 of 1902.

(1) (1863) 1 Bom. H. C. R. 229.

The plaintiffs sued to recover the sum of Rs. 3,500.

Bahadurji and *Kanga* for the plaintiffs.

Talyarkhan and *Mirza* for the defendants.

DAVAR, J. :—In the beginning of the year 1899 a country craft or *dhow* called "*Ali Madut*" came to Bombay from Cutch and was chartered to sail to the sea-port town of Noshi Be in the Island of Madagascar. The plaintiffs, acting as commission agents for four Borah merchants, put on board the said *dhow*, or *ganjo* as it is sometimes called, certain goods belonging to the said merchants. One of those merchants was Alibhai Jiwanji, the owner of the "*Ali Madut*", who had insured his goods at Cutch through the plaintiffs' firm at that place. The other three desired the plaintiffs to insure their goods in Bombay and a policy of insurance was effected with the firm of Haridas Purshottam and Company. A *kutcha* policy was effected on the 2nd of February 1899 on which date the ship appears to have sailed from Bombay, and the formal policy was subsequently executed on the 7th of February 1899 and is Exhibit F in the case. The goods belonging to the three merchants, for whom the plaintiffs' firm was acting as commission agents, were insured for Rs 3,500. It appears that the "*Ali Madut*" met with bad weather and was carried out of its course, and, after having battled with the sea for some days, was eventually wrecked in the vicinity of a sea-port town on the Eastern coast of Africa named Minkin Dari. When the ship struck on the rock, the Nakva and the crew abandoned it with all its cargo and, in a small boat belonging to the vessel, managed to land at Minkin Dari. That sea-port town belongs to the German Government and the authorities in that town, on being informed of the wreck, employed divers and saved a portion of the cargo which with the broken vessel was sold at Minkin Dari, and after deducting all necessary charges and expenses the balance of the sale proceeds were paid over by the German authorities to the agent of the owner of the vessel. The plaintiffs say that, on being informed of the loss of the vessel and cargo, they gave notice to the defendants' firm and demanded payment of the insurance moneys, and, the firm of Haridas Purshottam having

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911.
July 25.

KANJI DWARKADAS *v.* HARIDAS PURSHOTTAM.*

Insurance—Marine insurance—Insurable interest of agent in goods of principal—Effect of a Mahajan's "Majur"—Local custom when enforced—Duties and rights of insurer and policy-holder in case of total loss.

The plaintiffs, as commission agents, shipped certain goods on behalf of constituents on board the ship "*Ali Madut*" in the year 1899. The plaintiffs were instructed by their principals to insure these goods and accordingly by a policy dated February 7th, 1899, the plaintiffs insured the goods with the defendants, subject, as stated in the policy, to the custom of the port of Cutch Mandvi.

The ship "*Ali Madut*" was wrecked off the coast of German East Africa and the wreck and the remains of the cargo were sold by the local authorities and the proceeds handed over to the owner of the vessel.

The plaintiffs sued the defendants to recover Rs. 3,500 as the value of the goods.

The defendants, besides certain other objections to the plaint, objected that the plaintiffs as agents had no insurable interest in the goods; that by the custom of the port of Cutch Mandvi the claim of the plaintiffs could not be established without the production of a Mahajan's "*Majur*", and that the defendants were in any event entitled to credit for the sale proceeds of the wreck and cargo.

Held, that an agent who has authority from his principals, express, implied or ratified, can effect insurances on the goods of his principals; that the custom of the port of Cutch Mandvi must be construed in a reasonable manner and that under it a Mahajan's "*Majur*" could not be required in the case of total loss; that the policy-holder's duty was only to give intimation of total loss, at the earliest possible opportunity to the insurer, and that it was for the insurer to protect his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo.

Ransordas Bhogilal v. *Kesrising Mohanlal*(1), referred to.

THE plaintiffs, as commission agents for certain Borah merchants, shipped certain goods on board the *ganjo* or native ship "*Ali Madut*" and, at the instruction of their principals, insured the goods with the defendants for the sum of Rs. 3,500. The policy stated that the insurance was subject to the local custom prevailing at the sea-port town of Cutch Mandvi. The ship was wrecked off the coast of East Africa and the wreck and the remains of the cargo were sold by the local authorities and the sale proceeds paid to the owner of the vessel.

* O. C. S. Suit No. 9 of 1902.
(1) (1863) 1 Bom. H. C. R. 229.

father Edulji Sorabji Davar. That draft, Exhibit J, proves conclusively that the managing clerk, when he drafted the plaint, put in the names of the three surviving sons of Kanji Dwarkadas and the names of his three grandsons, the sons of his deceased son Liladhar, as the plaintiffs. Mr. Payne, to whom the plaint was submitted for settling, struck off all the names in the plaint, retaining only the words "Kanji Dwarkadas" in the draft, and added the words "carrying on business at Mint Road in Bombay." After the evidence of Sorabji and the production of the draft plaint, I think it is not open to the defendants to contend that the suit was filed in the name of an individual who was dead The suit was filed in the name of the firm as authorised by the Rule that had then recently come into force, and the suit as constituted, even without the addition of the words "a firm," is, in my opinion, properly constituted and is maintainable by the plaintiffs.

The second point urged by Mr. Talyarkhan on behalf of the defendants was that the plaint, not being signed by one of the plaintiffs, was bad and therefore the suit must fail. It is true that the plaint is not signed by any of the plaintiffs but is signed and verified by their *munim* Purshotamdas Ramdas. Section 51 of the old Code, which then applied to this suit, required that the plaint should be signed by the plaintiff but the same section provided that if the plaintiff is by reason of absence or other good cause unable to sign the plaint, it may be signed by any person duly authorised by him on his behalf. No doubt the plaintiffs, or some of them at least, were in Bombay when the plaint was declared and presented for admission. The learned counsel for the defendants in cross-examination elicited the fact from the plaintiffs' *munim* that he held a power-of-attorney which authorised him to sign plaints and file suits on behalf of the plaintiffs. He had not the power-of-attorney with him on that day. He was asked to produce it on the following day. That power was produced, and when it was suggested that Mr. Talyarkhan, having given notice to produce it, if he inspected it, might be called upon to put the power in, he refused to touch it. It was stated by the

1911.

KANJI DWARKADAS v. HARIDAS PURSHOTTAM.

learned counsel for the plaintiffs that there was very serious illness in the family of the plaintiffs which prevented them from attending to their business and that in consequence thereof the *munim* signed the plaint. No question was asked by Mr. Talyarkhan to the *munim* why the plaintiffs had not signed the plaint, and the learned counsel for the plaintiffs not realising the point of cross-examination did not ask the *munim* for the reason which was given as soon as the point was clealy stated to the Court. At the hearing I refused to entertain this objection on the part of the defendants seriously. The plaint was presented to the Court and a copy furnished to the defendants' attorneys ten years ago It was admitted that the copy showed that the plaint had been verified by the *munim* and not by any of the plaintiffs. They never took this objection in any form whatever till at the hearing, and I refused to entertain the same, as I had no reason whatever to disbelieve the statement made to me that it was owing to serious illness in the family that none of the plaintiffs had come to the Fort and signed this plaint. I am by no means sure that if this was a defect which required serious consideration that it would not have been cured by getting one of the plaintiffs, two of whom were present in Court throughout the hearing, to sign the plaint.

The next objection taken on behalf of the defendants was that the plaintiffs had no insurable interest in the goods, that the policy taken by them was, therefore, null and void, and that they were not entitled to recover under the policy. On the evidence before me I hold as proved that the plaintiffs were acting as commission agents for the three merchants for whom they purchased goods. They, as such agents, put the same on board the "*Ali Madut*", and consigned them to the said merchants' firm at Noshi Be. I also hold it as proved that the plaintiffs were specifically instructed and authorised to insure these goods in Bombay. And I hold it as proved that in taking out this policy of insurance the plaintiffs were acting under instructions from the owners of the goods and were authorised by them to insure the said goods. They paid for

1911.

KANJI DWARKADAS v. HARIDAS PURSHOTTAM.

the goods which they purchased in the market, they had a running account with those merchants and they debited the price of those goods to those merchants in their respective accounts.

The learned counsel for the defendants in support of his contention cited several passages from the Encyclopædia of the Laws of England on the subject of insurable interest. The passage which was not cited and which, I think, correctly summarizes the authorities on the subject is at page 587 of Vol. VIII of the Encyclopædia. It is there stated: "Besides the foregoing different kinds of 'assured' who can enter into a policy, policies can also be effected by agents for the assured. In order to do so, agents must have an authority from their principals—express, implied or ratified."

The Law on this head is summarized to the same effect at page 52 of Porter's Law of Insurance (2nd Edition): "A common carrier, pawn-broker, factor, broker, and wharfinger have an insurable interest in the goods entrusted to them; but if they insure the goods to their full value and receive it, they will, after satisfying their own claims, be trustees of the balance for the real owners" See *Sidaways* v. *Todd*[1].

The next point urged by the learned counsel for the defendants was that no claim of the plaintiffs could be established without the production of the Mahajan's "*Majur*". The policy recites that it is according to the local custom prevailing at the sea-port town of Cutch Mandvi In the correspondence that passed between the solicitors of the respective parties previous to the suit, the defendants' solicitors admit that the insurance was according to the custom of Cutch Mandvi, but they say their clients are unable to produce the Mahajan's "*Majur*", as the ship was lost at a port called Minkin Dari, before it reached its destination and therefore the Mahajans could make no "*Majur*" in respect of it.

On this head a great deal of fog seemed to have enveloped the minds of all parties concerned. The custom which

(1) (1818) 2 Stark. 400.

1911.

KANJI DWARKADAS v. HARIDAS PURSHOTTAM.

learned counsel for the plaintiffs that there was very serious illness in the family of the plaintiffs which prevented them from attending to their business and that in consequence thereof the *munim* signed the plaint. No question was asked by Mr. Talyarkhan to the *munim* why the plaintiffs had not signed the plaint, and the learned counsel for the plaintiffs not realising the point of cross-examination did not ask the *munim* for the reason which was given as soon as the point was clearly stated to the Court. At the hearing I refused to entertain this objection on the part of the defendants seriously. The plaint was presented to the Court and a copy furnished to the defendants' attorneys ten years ago. It was admitted that the copy showed that the plaint had been verified by the *munim* and not by any of the plaintiffs. They never took this objection in any form whatever till at the hearing, and I refused to entertain the same, as I had no reason whatever to disbelieve the statement made to me that it was owing to serious illness in the family that none of the plaintiffs had come to the Fort and signed this plaint. I am by no means sure that if this was a defect which required serious consideration that it would not have been cured by getting one of the plaintiffs, two of whom were present in Court throughout the hearing, to sign the plaint.

The next objection taken on behalf of the defendants was that the plaintiffs had no insurable interest in the goods, that the policy taken by them was, therefore, null and void, and that they were not entitled to recover under the policy. On the evidence before me I hold as proved that the plaintiffs were acting as commission agents for the three merchants for whom they purchased goods. They, as such agents, put the same on board the "*Ali Madut*", and consigned them to the said merchants' firm at Noshi Be. I also hold it as proved that the plaintiffs were specifically instructed and authorised to insure these goods in Bombay. And I hold it as proved that in taking out this policy of insurance the plaintiffs were acting under instructions from the owners of the goods and were authorised by them to insure the said goods. They paid for

prominent Indian merchants at those ports and they are called Mahajans.

It seems to me that it would be most unreasonable to hold that in every case under a policy such as the one in this suit, no claim could be established without the production of a Mahajan's "*Majur*". A custom to be enforceable at law must, amongst other things, be reasonable and the Court in the case, I have referred to, of *Ransordas Bhogilal* v. *Kesrising Mohanlal*[1] held that the usage sought to be established in that case, namely, that the Mahajan's *Majur* should be taken as conclusive evidence against the underwriter without production of manifests and account sales, was not a reasonable custom and, if the custom was not reasonable, it was not binding. There must be on the African and Arabian coasts numerous little sea-port towns where there may be no Indian merchants and how is a policy-holder to produce a Mahajan's "*Majur*" from places where the Mahajan never existed. Besides all this, it seems to me that there is great force in what was contended on behalf of the plaintiffs. They say a Mahajan's "*Majur*" is only necessary when the ship reaches its port of destination and when there is only a partial loss of cargo; but that in cases where there is actual or constructive total loss before the ship reaches its destination, there is no question of the production of a Mahajan's "*Majur*". That is the evidence given by witnesses who have great experience in this particular line of business and whose evidence is wholly trustworthy. There can be no doubt that this was a case of total loss. The ship *struck on a rock and was so broken up and damaged that the* Nakva and the crew abandoned the wreck with all its cargo. And the extent of damage to the ship may be gathered from the fact that the remnant of the ship was sold for Rs. 50. The circumstances surrounding the wreck of the vessel, the abandonment of the same by its officer and crew and the subsequent sale of the goods are such circumstances as have led the Courts to hold that it is a case of total loss and where in the opinion of competent authorities on the report

(1) (1863) 1 Bom. H. C. R. 229.

of the wreck it is found to be necessary to sell the cargo, *it has been held that the public sale per se* vested the proceeds of the sale in the underwriters. See *Saunders* v. *Baring*[1]. In that case Lord Blackburn held that the mere fact that a cargo of coals had been so damaged by the perils of the seas as to render an immediate sale necessary, and that they were *so sold, is sufficient to constitute* a total loss. In the same case it was further held that "where the money is in the hands of a third party, the assured is entitled to be paid the total loss . . . The underwriters must pay the total loss, and they will then be entitled to take all such steps to get all the proceeds from the hands of third parties, as the plaintiffs themselves could have taken."

In this case the principal partner in Haridas Purshottam's firm, Mr. Haridas, was alive when the news of the loss of the "*Ali Madut*" and its cargo reached Bombay. The evidence of the plaintiffs' *munim* and the plaintiffs' broker establish to my satisfaction that intimation was sent to him at the very earliest opportunity It was clearly his duty to take steps to secure his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo. He did nothing and took up an attitude of hostility, with the result that the net balance of the sale proceeds has been paid by the German authorities to the owner of the ship.

In law a policy-holder has nothing further to do in case of total loss but to give intimation of that loss at the earliest possible opportunity to the insurer and then claim moneys payable under his policy. This the plaintiffs have done. The absence of the Mahajan's "*Majur*" is pleaded merely for the purposes of defeating the plaintiffs' claim. The plaintiffs have before them a document of far greater reliability than a Mahajan's "*Majur*". Exhibits C and D are documents properly authenticated by the German authorities giving all the information and more than the Mahajan's "*Majur*" would have done. The evidence taken on commission and taken *de bene esse*, the evidence recorded by me and the documents Exhibits C and D,

(1) (1876) 34 L. T. 419.

prove conclusively that the "*Ali Madut*" with all its cargo was carried by stress of weather away from its course and wrecked in the vicinity of Minkin Dari, that the vessel broke up, the whole of the cargo went under water and only a portion of it was subsequently saved, that the officers of the German Government at Minkin Dari sold the wreck and the cargo that was saved, and, after paying all proper expenses, handed over the net balance of Rs 3,370 to the agent of the owner of the "*Ali Madut*". The whole cargo on board the ship was worth about Rs. 20,000 and the approximate contribution which the defendants would be entitled to claim is somewhere about 580 odd rupees. And this claim the underwriters had and may still have against the third party who held the moneys, and the plaintiffs as policy-holders had nothing whatever to do with what took place after the wreck.

It seems to me that Haridas realized that there would be many difficulties in the way of the plaintiffs' proving their case in Bombay and he merely set up the absence of the Mahajan's "*Majur*" as a pretext for the purpose of escaping payment. I hold that the custom attempted to be set up by the defendants is not proved, that it is vague, indefinite and unreasonable as enunciated on their behalf, and as such not binding on the plaintiffs even if it had been proved as alleged.

At one time it was contended that the "*Ali Madut*" was not in a seaworthy condition when she left Bombay. There was absolutely no justification whatever for this contention and the learned counsel for the defendants abandoned it at the hearing after having put the plaintiffs to the trouble of proving the falsity of this contention.

It was further contended on behalf of the defendants that they were entitled to a proportionate credit out of the net balance realized by the sale of the cargo. I have dealt with this point. Rs 580 odd would undoubtedly have been the proportionate share of Haridas Purshottam and Company in the net sale proceeds on the assumption that the owner of the ship was not entitled to claim priority of payment for his freight which amounted to between Rs. 2,700 and Rs. 2,800

1911.

KANJI DWARKADAS v. HARIDAS PURSHOTTAM.

and the expenses of bringing the crew down from Minkin Dari to Bombay. That claim as I have said above the insurers may have against the owner to whom the balance has been paid.

Mr. Talyarkhan further contended at the hearing that no notice of this loss was given to the insurers till more than two years after the loss. This contention is, I think, untenable. In the very first letter addressed to Haridas Purshottam and Company by the plaintiffs' solicitors, it is stated that due notice of such loss was given to them. In the reply it is not denied that notice was given to them, but it is denied that "any proper notice" had been given. I believe the broker when he says that he went and informed Haridas of this loss as soon as he was instructed to do so by the plaintiffs' *munim*. And by proper notice I take it that Haridas meant no written notice was given to him before the 24th of June 1901.

The last contention was that the plaintiffs could not establish their claim without producing a protest from Minkin Dari. I do not quite understand this contention and it was not seriously pressed. The facts in this case are proved by evidence that to my mind is satisfactory. We have in this case the testimony of the Nakva of the "*Ali Madut*" recorded *de bene esse* and Exhibits C and D. I do not, therefore, see what more is required to be done by the plaintiffs to establish their claim. The actual value of the goods insured belonging to the three constituents of the plaintiffs is proved to be Rs. 3,170-12-6. To that must be added Rs. 31 being the plaintiffs' commission, making altogether the sum of Rs. 3,201-12-6. In taking out the policy the plaintiffs included freight which came to Rs. 274-4-0 and insured the goods for the round sum of Rs. 3,500.

Plaintiffs seek to recover the policy moneys with interest at 9 per cent. per annum from the first day of October 1899. This is a suit filed in the very beginning of 1902. No doubt, there were many difficulties in the way of the plaintiffs in proof of their case. These difficulties were entirely created by the obstructive attitude taken up by Haridas. The plaintiffs had to get witnesses to Bombay and have them examined

1911.

KANJI DWARKADAS v. HARIDAS PURSHOTTAM.

de bene esse. They had to get some of their witnesses examined on commission, but the *de bene esse* examination and the commission evidence was all taken and finished by the end of 1903 and yet I find that this case was transferred to the Stayed List on the 29th of January 1903 and remained in the Stayed List till the 17th of April 1909, more than six years. At one time I felt inclined to give expression to my disapprobation of this scandalous delay in bringing the suit to a hearing by depriving the plaintiffs of their interest on the sum that may be found due to them for a period longer than a year or eighteen months which ought to be the utmost limit within which a suit should be brought to a hearing and terminated ordinarily But having regard to the attitude adopted by the original defendants, having regard to the fact that they acquiesced in the delay and took no steps whatever to bring the suit to a hearing, I feel that if I deprive the plaintiffs of any portion of their interest or cost, I would be punishing one party when both are guilty of what I cannot help stigmatising as scandalous conduct in sleeping over this case for ten years. Neither the plaintiffs nor their principals have had to pay freight on the goods that were lost to them and any possible claim by the owner is now wholly barred. I, therefore, hold that under the policy the actual loss sustained by the owners of the goods and by the plaintiffs, including the plaintiffs' commission, is Rs. 3,201-12-6. For this amount there will be a decree for the plaintiffs. I will allow interest on this sum but in my opinion a fair mercantile rate of interest to allow would be at the rate of 6 per cent. and not 9 per cent.

I find the issues 1, 2, 3, 4, 5, 6, 8 and 9 in the affirmative.

On the 7th issue I find that the loss sustained amounts to Rs. 3,201-12-6. I pass a decree for that amount with interest thereon at 6 per cent. per annum from the 1st of October 1899 up to date. Costs and interest on judgment at 6 per cent. till payment. Costs to include all costs reserved.

The decree will be against the defendants in their representative capacity in which they are sued, and will be limited to the extent of the assets of the original partners in Haridas

1911.

KANJI WARKADAS v. HARIDAS PURSHOTTAM.

Purshottam and Company which may have come to their hands.

Attorneys for the plaintiffs: *Messrs. Payne & Co.*
Attorneys for the defendants: *Messrs. Little & Co.*

Suit decreed.
H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

DAGDU VALAD ANANDRAM AND OTHERS (ORIGINAL DEFENDANTS Nos. 2—4), APPELLANTS, v. MIRASAHEB VALAD TANHAJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2†—Agriculturist—Definition—Son of agriculturist is not an agriculturist.

The minor son of an agriculturist who is depending for his support on his father is not an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain means of livelihood by it.

SECOND appeal from the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree passed by D. G. Medhekar, Subordinate Judge of Shevgaon.

---

* Second Appeal No. 912 of 1910.

† Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2, runs as follows:—

2\. . . . . .

1st—"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may, for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

* * * * * * *

2nd—In Chapters II, III, IV and VI, and in section 69, the term "agriculturist," when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding, was incurred, was an agriculturist within the meaning of that word as then defined by law.

Suit to redeem a mortgage.

The mortgage in question was passed by one Tanhaji (father of the plaintiff) in 1893 in favour of the defendant No. 1. The deed was expressed in the form of a sale-deed. At the date of mortgage the plaintiffs were living with their father Tanhaji who was an agriculturist and who maintained them.

In 1908 the plaintiffs brought this suit to redeem the mortgage.

The Subordinate Judge held that transaction evidenced by the deed was a mortgage and passed the usual redemption decree.

This decree was confirmed on appeal by the District Judge. One of the issues raised before the learned Judge was whether the plaintiffs were entitled to the benefit of the provisions of section 10A of the Dekkhan Agriculturists' Relief Act. This issue was found in the affirmative on the ground that at the date when the liability was incurred, that is, in 1893, the plaintiffs who were minors were maintained by their father Tanhaji who was an agriculturist; and that the plaintiffs were therefore entitled to be treated as agriculturists.

The defendants appealed to the High Court.

K. H. Kelkar, for the appellants.

D. A. Khare, for the respondents.

CHANDAVARKAR, J.:—The minors concerned in this case, it is found, were not agriculturists at the time of the suit. But the Courts below have given them the benefit of the provisions of the Dekkhan Agriculturists' Relief Act under the second definition of section 2, cl. (2), of the Act. According to that section, we must see what the definition of 'agriculturist' was at the time the liability was incurred. That definition was the same in 1893 that it is now, and, therefore, we have to see whether the minors concerned, either by themselves, or by their servants, or by their tenants, "earned their livelihood," wholly or principally by agriculture. It is found as a fact by the learned District Judge that at the time the liability was incurred these were minors depending for their support on their father who was an agriculturist at

1912.

DAGDU v. MIRASAHEB.

that time, and, therefore, their income, if they can be said to have had an income, was chiefly derived from agriculture. That was because they depended upon their father for their livelihood. But dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain the means of livelihood by it: *Dwarkojirav Baburav* v. *Balkrishna Bhalchandra*[1] Upon the ground that there is no evidence whatever to show that the minors earned their livelihood by agriculture at the time the liability was incurred, the decree must be reversed and the case sent back to the Subordinate Judge to be dealt with on the merits according to law with reference to the observations in this judgment.

Costs hitherto incurred to be costs in the cause.

Decree reversed.

R. R.

(1) (1894) 19 Bom. 255.

CIVIL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. *January 9.*

BHAGWANT RAMCHANDRA SHAHAPURKAR, PLAINTIFF, v. KAJI MAHAMAD ABAS WALAD KAJI MAHAMAD RUKMODIN, DEFENDANT.*

Civil Procedure Code (Act V of 1908), section 48—Limitation Act (IX of 1908), section 9—Minor—Extension of time—Decree—Execution.

A decree obtained on the 17th February 1898 was sought to be executed in 1901 by the decree-holder. As the decree-holder died thereafter leaving a minor son, further applications to execute the decree were filed by the minor's guardian, all within time. The minor attained majority in 1910. He then applied for the extension of the period of twelve years for the execution of the decree prescribed by section 48 of the Civil Procedure Code of 1908, on the ground of his minority between 1901-1910

Held, that the period could not be extended under section 48 of the Civil Procedure Code, 1908, for once the limitation began to run from the date of the decree, the twelve years' period must be computed from that date.

* Civil Reference No. 11 of 1911.

1912.

BHAGWANT RAMCHANDRA v. KAJI MAHAMAD ABAS.

THIS was a reference made under Order XLVI, Rule 1, of the Civil Procedure Code of 1908, by R. G. Bhadbhade, Judge of the Court of Small Causes at Poona.

The decree sought to be executed was obtained by the applicant's father on the 17th February 1898. He made one application for execution thereof in 1901. Since then, he having died, the applicant, who was a minor son of the decree-holder, made several applications for execution through his guardian within three years of each other. He reached majority in 1910. After this, he applied for extension of the period of twelve years for the execution of the decree, prescribed by section 48 of the Civil Procedure Code, on the ground of his minority between *1901-1910*.

On these facts, the question that arose for determination was whether section 9 of the Limitation Act applied to the case. The Subordinate Judge felt a doubt as to the determination of the question. He, therefore, referred it to the High Court. His opinion on the question referred was in the affirmative, on the following grounds :—

"The case relied on by the applicant's pleader, I. L. R. 16 Bom. 536, is not in point as it refers only to a decree obtained by a minor. The point now raised is touched upon in I. L. R. 20 Cal 714, *Lolit Mohun* v *Janoky Nath*, at p. 716, and is put in the form of a *quaere* by Mr. Starling in his Commentary on section 6 of the Limitation Act (new edition), p. 46. Mr. Starling at p. 62 in his note to section 9 also refers to a Punjab case in which it appears to have been held that section 9 of the Limitation Act does not apply to applications.

"As Article 182, Schedule I, of the Limitation Act is expressly made applicable to execution of decrees not provided for by section 48 of the Civil Procedure Code, I think section 9 of the Limitation Act ought to be applied to the twelve years' period."

The reference was heard.

Nilkanth Atmaram, amicus curiæ, for the plaintiff.

S. S. Patkar, amicus curiæ, for the defendant.

The following cases were referred to in arguments :—*Moro Sadashiv* v. *Visaji Raghunath*[1]; *Veeramma* v. *Abbiah*[2]; *Bihari Lal* v. *Baness*[3]; and *Jivraj* v. *Babaji*[4].

(1) (1891) 16 Bom. 536.
(2) (1891) 18 Mad. 99.
(3) (1889) P. R. No. 109 of 1889 (Civ.).
(4) (1901) 23 Bom. 68.

1912.

BHAGWANT RAMCHANDRA v. KAJI MAHAMAD ABAS.

CHANDAVARKAR, J.:—We are indebted to each of the pleaders for appearing in this reference as *amicus curiæ*. Mr. Nilkanth has placed before us all the available authorities on the point and argued the Reference in support of the plaintiff. But we are of opinion that our answer to the Reference must be that the claim is barred by the law of limitation prescribed in section 48 of the Code of Civil Procedure. We agree with the Subordinate Judge in the view he has taken, namely, that the decree having been obtained by the plaintiff's father and time having once begun to run under section 9 of the Limitation Act, no subsequent disability, that is, the minority of the plaintiff, could arrest it. Once the limitation began to run from the date of the decree, the twelve years' period must be computed from that day. The point is practically decided by this Court in *Jivraj* v. *Babaji*[1]. With this answer the Reference must be returned to the Subordinate Judge.

Answer accordingly.

R. R.

(1) (1901) 29 Bom. 68.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. *January 11.*

RAMCHANDRA SHIVAJIRAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. TAMA, WIDOW OF RAGHO MANGLYA (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 107—Lease exceeding one year—Registration—Unregistered lease cannot be received as evidence—Evidence Act (I of 1872), section 91—Oral evidence of the lease cannot be given—Tenant admitting landlord's title—Amount of rent can be proved by other evidence—Parties—Admission—Estoppel—Practice.

The plaintiff owned a one-third share in certain salt-pans, which share was during her minority leased by her guardians for a period of three years at an annual rental of Rs 500. The plaintiff having attained majority, she at the expiration of the period, let her share to the same lessees for a further period of two years at the

* Second Appeal No 91 of 1911.

rent of Rs. 1,000 a year The new lease though in writing was not registered. The plaintiff sued to recover the rent for the two years at the rate of Rs. 1,000 a year and also Rs. 653 for rent due on the first lease. The defendants admitted the plaintiff's ownership and their tenancy under her, but disputed the amount of rent.

Held, that the plaintiff could not be allowed to rely on the lease set up by her, because it was not registered (section 107 of the Transfer of Property Act); nor could she be allowed to give oral evidence of the lease (section 91 of the Indian Evidence Act).

Held, further, that the defendants having admitted the ownership of the plaintiff and that they were in as her tenants, proof of the relation of landlord and tenant became unnecessary

Held, also, that the plaintiff could only recover as for use and occupation for the two years of the tenancy admitted, at the rate claimed by her which was not excessive

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Thana, reversing the decree passed by D. D. Cooper, Joint Subordinate Judge at Thana

The plaintiff was the owner of a one-third share in a salt-pan known by the name of Ganapati Prasad, the remainder of which was owned by one Dharman. The plaintiff being a minor her share was leased to the defendant by her guardians for a period of three years on a rental of Rs 500 a year. Dharman also leased his share in the salt-pans to the defendant for a period of five years. When the three years' lease granted by the guardians had expired the plaintiff had attained majority. She therefore granted a lease of her share to the defendants for a further period of two years, at the rate of Rs. 1,000 a year. The fresh lease was not registered.

At the end of the term, the plaintiff sued to recover from the defendants Rs. 1,000 due on the fresh lease and Rs. 653 due on the first lease.

The defendants contended *inter alia* that the lease first granted by the plaintiff's guardians was for a period of five years, that they entered into no fresh lease with the plaintiff; that assuming that a fresh lease was entered into, it was not valid as no sanction of the Collector was taken for it; and that they were liable to pay Rs. 653 (which amount they produced in Court).

It was shown at the trial, that when the plaintiff granted the fresh lease alleged by her, another merchant was ready to take the salt-pan on a higher rent; while one Laxmishankar was willing to pay a rent of Rs. 7,000 per year. At the date of the suit, the defendants had taken a new lease of the salt-pan at Rs. 6,100 a year. The defendants having denied the fresh lease from the plaintiff, she called upon them to produce the receipts which she had granted for rents paid to her by the defendants. They produced only one receipt; and as they denied the existence of any other receipt, the plaintiff was allowed to put into evidence counterfoils of those receipts.

The Subordinate Judge held that the fresh lease alleged by the plaintiff was not proved; that it was not void on the ground of want of the Collector's sanction; that the plaintiff's claim to recover Rs. 1,000 from the defendants was unsustainable; and that she was only entitled to get Rs. 653 deposited by the defendants in Court.

On appeal, this decree was reversed by the Assistant Judge who held that inasmuch as the plaintiff allowed the defendants to remain in possession of her share in the salt-pan the latter must be considered yearly tenants at the enhanced rent: and that it could fairly be implied from the conduct of the parties. The learned Judge, therefore, awarded the whole of the plaintiff's claim.

The defendants appealed to the High Court.

G. S. Rao, for the appellants.

Robertson, with *D. A. Khare*, for the respondent.

CHANDAVARKAR, J.:—The plaintiff (who is respondent in this second appeal) alleged in her plaint that the salt-pan in dispute in which she had interest to the extent of one-third had been leased away during her minority to the appellants for a period of three years on a rental of Rs. 500 a year by her guardians and one Dharman, who owned the remaining two-thirds share; that, on the expiry of that period, she, having attained the age of majority, let her interest for two years to the appellants on a rental of Rs. 1,000 a year. She sought to

1912.

RAMCHANDRA SHIVAJIRAM v. TAMA.

recover the rent of those two years at that rate and also Rs. 653 as rent due on the previous lease.

The appellants in their written statement admitted the respondent's ownership of the salt-pan and also their tenancy under her and Dharman, but they contended that they had been in possession from the beginning under a lease for five years, not three years, as alleged in the plaint.

Section 107 of the Transfer of Property Act requiring that "a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument", the respondent could not be allowed to rely on the lease set up by her, because it was not registered: *Ardesir Bejonji Surti* v *Syed Sirdar Ali Khan*[1]. Nor could she be allowed to give oral evidence of that lease (section 91 of the Indian Evidence Act).

But the appellants having admitted in their written statement the ownership of the respondent and that they were in as her tenants, proof of the relation of landlord and tenant became unnecessary. "A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed; and 'admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them.'" *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*[2].

The only question, then, at issue, was the amount of rent payable. So far as the agreement set up by either party was concerned, it was inadmissible in evidence and no oral evidence could be given of it. The respondent could only recover as for use and occupation for the two years of the tenancy admitted.

We have evidence in the case to show that at the beginning of the two years' tenancy, admitted by the appellants, one merchant was ready to take the salt-pan on a higher rent than

(1) (1908) 33 Bom. 610.

(2) (1880) 5 Bom. 143 at p. 152

1912.

RAMCHANDRA SHIVAJIRAM v. TAMA.

Rs. 5,000, which they had paid till then; that another merchant was willing to pay a rent of Rs. 7,000 per annum; and that the appellants were paying at the date of the suit Rs. 6,100. The lower appellate Court has believed this evidence, and the rent claimed in the plaint and awarded by that Court cannot be regarded as excessive for the appellants' use and occupation of the salt-pan.

Two other points were urged before us in support of the appeal—one that the lease of the salt-pan was illegal because it had not the sanction of the Collector of Salt Revenue, and the other that the report of the guardians of the plaintiff made to the District Judge was inadmissible. We agree with the lower Courts that the lease was not illegal, and that the report was admissible.

The decree is confirmed with costs.

BATCHELOR, J.:—I agree. In my opinion the receipts issued by the plaintiff for payments made to her were rightly admitted in evidence, and, if that is so, the decree under appeal must be affirmed. It seems to me that these receipts are admissible, not as proving the terms of the contract of letting, but as proving from the conduct of the parties, what would be a fair rent for the admitted tenancy. Reference may also be made to illustration (*e*) of section 91, Evidence Act.

Decree confirmed.

R. R.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912
January 31.

EMPEROR *v.* DATTATRAYA LAXMAN SARPOTDAR.*

*Bombay District Police Act (Bombay Act IV of 1890), section 42—District Magistrate—Order for prevention of disorder—Promulgation of the order—Presence of the Magistrate at the place when the order is promulgated—*Ultra vires *order.*

A District Magistrate issued a notification, under the provisions of section 42 of the Bombay District Police Act, 1890, prohibiting circulation of certain pictures

* Criminal application for Revision No. 312 of 1911.

throughout the whole District. The notification was promulgated in all the Taluka head-quarters. The Taluka head quarters of the village, where the accused lived, was nearly twelve miles distant. At the time when he issued the notification, the District Magistrate was at a considerable distance from the village. The accused was convicted of having disobeyed the notification, in that he sold the prohibited pictures at his village.

Held, reversing the conviction and sentence, that the notification in question could not be upheld under section 42, because (1) it was not promulgated at the village where the accused lived and (2) the District Magistrate was not present at or near the village at the time of the promulgation.

Per Chandavarkar, J.—The preliminary conditions essential under the provisions of section 42 of the District Police Act, for the exercise of the jurisdiction conferred by it, are these: (1) the jurisdiction is conferred on the Magistrate of the District or in his absence and subject to his own order the Magistrate of the First Class; (2) these must have jurisdiction in the town or village where the jurisdiction is intended to operate; (3) they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction under the section is set in motion.

THIS was an application to revise conviction and sentence passed by H. B. Clayton, District Magistrate of Ratnagiri, on appeal from conviction and sentence passed by H. B. Khanolkar, Second Class Magistrate at Ratnagiri.

The accused lived in the village of Shiposhi in the Ratnagiri District. He kept a shop where he sold among other things almanacs which had on the cover a likeness of Bal Gangadhar Tilak.

The Magistrate of the District, purporting to act under section 42 of the Bombay District Police Act, 1890, issued a notification on the 4th May 1909, prohibiting the sale of almanacs above referred to. The notification ran as follows:—

"Whereas the District Magistrate is informed that pictures of certain convicted murderers and seditious agitators such as Khudiram Bose and Bal Gangadhar Tilak are being exhibited and sold or otherwise disseminated in this District and whereas in the District Magistrate's opinion such pictures are of such a nature as to incite to resistance to and contempt of the law and of lawful authority:

"Now therefore the District Magistrate under section 42 of the Bombay Act IV of 1890, prohibits at all places in this District the exhibition, sale or other dissemination of such pictures and orders the Police to arrest and prosecute any person disobeying this prohibition, and to seize any such pictures being exhibited, sold or otherwise disseminated."

1912

EMPEROR v. DATTATRAYA LAXMAN.

This notification was not published at the village of Shiposhi. It was only published at all the Taluka head-quarter towns in the District, the nearest of which was twelve miles distant from the village of Shiposhi. At the time when he issued the notification, the District Magistrate was at a considerable distance from the village.

The accused sold some of the prohibited pictures at Shiposhi in March 1910. He was charged in August 1911 with having disobeyed the order duly promulgated by the District Magistrate. He was convicted by the Second Class Magistrate of Ratnagiri of the offence charged and sentenced to pay a fine of Rs. 50. On appeal, the District Magistrate confirmed the conviction but reduced the fine to Rs. 25.

The accused applied to the High Court under the criminal revisional jurisdiction.

B. V. Desai, for the accused.—*An order passed under section* 42 of the Bombay District Police Act, 1890, must be (1) limited in time; (2) limited in place; and (3) publicly promulgated. The order in this case is not limited in time for no limit of time is shown; nor is it limited in place, for it was promulgated throughout the District. Further, it was not at all promulgated at the village of Shiposhi, where the accused lived.

Again, 'sale' of a book or picture is not its dissemination, for in sale the act is done without intention or knowledge.

G. S. Rao, Government Pleader, for the Crown.—Section 79 of the District Police Act, 1890, covers any defect of publication: the order is, therefore, legal. It is competent to the District Magistrate to promulgate the order throughout the whole of the area under his jurisdiction, *i.e.*, the entire District. The phrase "such town or village" means any town or village within the District over which he has jurisdiction.

CHANDAVARKAR, J.:—The petitioner asks this Court to hold as *ultra vires* the proclamation of the District Magistrate of Ratnagiri, prohibiting the dissemination in the said District of pictures or symbols of Bal Gangadhar Tilak. The main ground

of objection to the legal validity of the proclamation is that in terms it prohibits the circulation of the book in question *throughout* the District of Ratnagiri and not in any particular town or village, or neighbourhood thereof. It is urged that section 42 of the Bombay District Police Act (No. IV of 1890) gives no power to the District Magistrate to issue a proclamation so as to make it apply to the District in general.

The section is not clearly worded but I think that the preliminary conditions essential under its provisions for the exercise of the jurisdiction conferred by it are these: *first*, the jurisdiction is conferred on the Magistrate of the District, or, in his absence and subject to his order, the Magistrate of the First Class; *secondly*, these must have jurisdiction in the town or village where the jurisdiction is intended to operate; *thirdly*, they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction under the section is set in motion. There is no evidence in the present case that at the time the proclamation complained of as illegal was issued the District Magistrate was either in the place or the neighbourhood of the place where the petitioner is alleged to have disobeyed the terms of that proclamation. The proclamation was issued by the District Magistrate from Dapoli where he then was.

The section we are construing is of a penal character and must be strictly construed as it affects the liberty of the subject. The intention of the Legislature appears to have been that such a proclamation as is contemplated by the section should be issued in such a manner as to give full publicity to its terms on the responsibility of the District Magistrate or Magistrate of the First Class, who must be personally in the place to satisfy himself that there is necessity for the proclamation.

The rule must be made absolute by quashing the conviction and sentence and directing the fine, if paid, to be refunded.

BATCHELOR, J.:—The only question is, under section 68 of the Bombay District Police Act, 1890, whether the District Magistrate's order, which the accused is found to have

1912.

EMPEROR v. DATTATRAYA LAXMAN.

This notification was not published at the village of Shiposhi. It was only published at all the Taluka head-quarter towns in the District, the nearest of which was twelve miles distant from the village of Shiposhi. At the time when he issued the notification, the District Magistrate was at a considerable distance from the village.

The accused sold some of the prohibited pictures at Shiposhi in March 1910. He was charged in August 1911 with having disobeyed the order duly promulgated by the District Magistrate. He was convicted by the Second Class Magistrate of Ratnagiri of the offence charged and sentenced to pay a fine of Rs 50. On appeal, the District Magistrate confirmed the conviction but reduced the fine to Rs. 25.

The accused applied to the High Court under the criminal revisional jurisdiction.

B. V. Desai, for the accused.—An order passed under section 42 of the Bombay District Police Act, 1890, must be (1) limited in time; (2) limited in place; and (3) publicly promulgated. The order in this case is not limited in time for no limit of time is shown; nor is it limited in place, for it was promulgated throughout the District. Further, it was not at all promulgated at the village of Shiposhi, where the accused lived.

Again, 'sale' of a book or picture is not its dissemination, for in sale the act is done without intention or knowledge.

G. S. Rao, Government Pleader, for the Crown.—Section 79 of the District Police Act, 1890, covers any defect of publication: the order is, therefore, legal. It is competent to the District Magistrate to promulgate the order throughout the whole of the area under his jurisdiction, *i.e.*, the entire District. The phrase "such town or village" means any town or village within the District over which he has jurisdiction.

CHANDAVARKAR, J.:—The petitioner asks this Court to hold as *ultra vires* the proclamation of the District Magistrate of Ratnagiri, prohibiting the dissemination in the said District of pictures or symbols of Bal Gangadhar Tilak. The main ground

of objection to the legal validity of the proclamation is that in terms it prohibits the circulation of the book in question *throughout* the District of Ratnagiri and not in any particular town or village, or neighbourhood thereof. It is urged that section 42 of the Bombay District Police Act (No. IV of 1890) gives no power to the District Magistrate to issue a proclamation so as to make it apply to the District in general.

The section is not clearly worded but I think that the preliminary conditions essential under its provisions for the exercise of the jurisdiction conferred by it are these: *first*, the jurisdiction is conferred on the Magistrate of the District, or, in his absence and subject to his order, the Magistrate of the First Class; *secondly*, these must have jurisdiction in the town or village where the jurisdiction is intended to operate; *thirdly*, they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction under the section is set in motion. There is no evidence in the present case that at the time the proclamation complained of as illegal was issued the District Magistrate was either in the place or the neighbourhood of the place where the petitioner is alleged to have disobeyed the terms of that proclamation. The proclamation was issued by the District Magistrate from Dapoli where he then was.

The section we are construing is of a penal character and must be strictly construed as it affects the liberty of the subject. The intention of the Legislature appears to have been that such a proclamation as is contemplated by the section should be issued in such a manner as to give full publicity to its terms on the responsibility of the District Magistrate or Magistrate of the First Class, who must be personally in the place to satisfy himself that there is necessity for the proclamation.

The rule must be made absolute by quashing the conviction and sentence and directing the fine, if paid, to be refunded.

BATCHELOR, J.:—The only question is, under section [illegible] Bombay District Police Act, 1890, whether the Magistrate's order, which the accused is [illegible]

1912.

EMPEROR v. DATTATRAYA LAXMAN.

This notification was not published at the village of Shiposhi. It was only published at all the Taluka head-quarter towns in the District, the nearest of which was twelve miles distant from the village of Shiposhi. At the time when he issued the notification, the District Magistrate was at a considerable distance from the village.

The accused sold some of the prohibited pictures at Shiposhi in March 1910. He was charged in August 1911 with having disobeyed the order duly promulgated by the District Magistrate. He was convicted by the Second Class Magistrate of Ratnagiri of the offence charged and sentenced to pay a fine of Rs 50. On appeal, the District Magistrate confirmed the conviction but reduced the fine to Rs. 25.

The accused applied to the High Court under the criminal revisional jurisdiction.

B. V. Desai, for the accused.—An order passed under section 42 of the Bombay District Police Act, 1890, must be (1) limited in time; (2) limited in place; and (3) publicly promulgated. The order in this case is not limited in time for no limit of time is shown; nor is it limited in place, for it was promulgated throughout the District. Further, it was not at all promulgated at the village of Shiposhi, where the accused lived.

Again, 'sale' of a book or picture is not its dissemination, for in sale the act is done without intention or knowledge.

G. S. Rao, Government Pleader, for the Crown.—Section 79 of the District Police Act, 1890, covers any defect of publication: the order is, therefore, legal. It is competent to the District Magistrate to promulgate the order throughout the whole of the area under his jurisdiction, *i.e.*, the entire District. The phrase "such town or village" means any town or village within the District over which he has jurisdiction.

CHANDAVARKAR, J.:—The petitioner asks this Court to hold as *ultra vires* the proclamation of the District Magistrate of Ratnagiri, prohibiting the dissemination in the said District of pictures or symbols of Bal Gangadhar Tilak. The main ground

of objection to the legal validity of the proclamation is that in terms it prohibits the circulation of the book in question *throughout* the District of Ratnagiri and not in any particular town or village, or neighbourhood thereof. It is urged that section 42 of the Bombay District Police Act (No. IV of 1890) gives no power to the District Magistrate to issue a proclamation so as to make it apply to the District in general.

The section is not clearly worded but I think that the preliminary conditions essential under its provisions for the exercise of the jurisdiction conferred by it are these: *first*, the jurisdiction is conferred on the Magistrate of the District, or, in his absence and subject to his order, the Magistrate of the First Class; *secondly*, these must have jurisdiction in the town or village where the jurisdiction is intended to operate; *thirdly*, they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction under the section is set in motion. There is no evidence in the present case that at the time the proclamation complained of as illegal was issued the District Magistrate was either in the place or the neighbourhood of the place where the petitioner is alleged to have disobeyed the terms of that proclamation. The proclamation was issued by the District Magistrate from Dapoli where he then was.

The section we are construing is of a penal character and must be strictly construed as it affects the liberty of the subject. The intention of the Legislature appears to have been that such a proclamation as is contemplated by the section should be issued in such a manner as to give full publicity to its terms on the responsibility of the District Magistrate or Magistrate of the First Class, who must be personally in the place to satisfy himself that there is necessity for the proclamation.

The rule must be made absolute by quashing the conviction and sentence and directing the fine, if paid, to be refunded.

BATCHELOR, J.:—The only question is, under section 68 of the Bombay District Police Act, 1890, whether the District Magistrate's order, which the accused is found to have

disobeyed, was an order lawfully issued under section 42 of the Act. That order, which was published only at the Taluka head-quarter town, prohibited the dissemination of pictures or symbols of, among other persons, Bal Gangadhar Tilak: the order specified no period of time and no geographical area over which it was to operate. The accused is found to have sold almanacs containing pictures of Tilak, not in the head-quarter town, but in his own village, distant some twelve or thirteen miles away

Now section 42 (1) of the Act runs as follows :—

"The Magistrate of the District, or in his absence and subject to his order the Magistrate of the First Class having jurisdiction in any town or village and present therein or in the neighbourhood thereof, may, whenever and for such time as it shall appear necessary, by a notification publicly promulgated or addressed to individuals, prohibit in such town or village or the vicinity thereof the carrying of arms, cudgels or other weapons, the carrying, collection and preparation of stones or other missiles or instruments or means of casting or impelling missiles, the exhibition of persons or of corpses or figures thereof, the public utterance of cries, singing of songs, playing of music, delivery of harangues and use of gestures or mimetic representations and the preparation, exhibition or dissemination of pictures, symbols, placards or of any other object or thing, which may be of a nature to outrage morality or decency or, in the opinion of such Magistrate, may probably inflame religious animosity or hostility between different classes or incite to the commission of an offence, to a disturbance of the public peace or to resistance to or contempt of the law, or of a lawful authority."

As to the argument that sale is not a form of dissemination within the meaning of the section, I am unable to accept it. As to the objection that the District Magistrate's order is bad because it prescribes no period of time for its operation, I refrain from expressing any opinion, since in my judgment the order is, for another reason, not a lawful order. That reason is that I cannot find in the section any warrant for the view that the District Magistrate is empowered, by an order promulgated only in the Taluka head-quarters and containing no reference to any area, to make punishable acts done in a village twelve miles away.

The learned Government Pleader has sought to defend the order on the ground that section 42 should be read as conferring on the Magistrate of the District the same powers to make

general orders in respect of the whole District as are conferred on a Magistrate of the First Class in respect of any town or village within his jurisdiction. It appears to me, however, that the words of the section are quite incapable of any such interpretation. The section is not perhaps very artistically drafted, and it is arguable that the words "having jurisdiction in any town or village" refer only to the Magistrate of the First Class and not to the Magistrate of the District, but that argument seems to me to be negatived by the following words giving power to "prohibit in *such* town or village." These last words are, I think, manifestly referable equally to the Magistrate of the First Class and to the Magistrate of the District; if so, then the earlier words "having jurisdiction in any town or village" must also refer to the Magistrate of the District. To hold that the Magistrate of the District may, by a general order, prohibit acts throughout the District would, I think, be simply to enact a new section in substitution for section 42. For section 42 plainly limits the prohibiting powers of the Magistrate, whether it be the Magistrate of the District or the Magistrate of the First Class: in either case all that he may do is to "prohibit in such town or village", that is to say, in any town or village which is within his jurisdiction, and in which, or the neighbourhood of which, he is present. It is not suggested that the District Magistrate was present in the accused's village when this order was issued, nor can a distance of twelve miles be regarded as either "neighbourhood" or "vicinity", for these words were presumably intended to include only suburbs or immediate surroundings, and, in any case, there was no prohibition in any town or village, whether the accused's village or another.

Penal sections must be construed strictly, and I think the present order was wholly outside the scope of section 42. I agree therefore that the rule must be made absolute.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

1912. *March* 12.

MAGNIRAM VITHURAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAKUBAI MARD RAKHMA LOHAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 325A—Transfer of Property Act (IV of 1882), section 43—Specific Relief Act (I of 1877), section 18—Attachment of lands—Transfer of execution proceedings to Collector—Letting out by Collector—Cesser of Collector's powers—Sale by the owner of his interest—Sale effective in favour of the purchaser.

The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor. The plaintiff's brother attached the family lands. The matter went in execution to the Collector who leased the lands to one Piraji. Subsequently the plaintiff and the defendants came to an understanding by which the plaintiff agreed to remit his mortgage debt and pay off his brother—the judgment creditor—and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants. Thereupon, the plaintiff having brought a suit to recover possession,

Held, allowing the claim, that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer, and the Collector's powers having ceased by reason of the proceedings in attachment being closed, the conveyance of the defendant's interest to the plaintiff took effect in his favour.

Gangabai v. *Baswant*(1) and *Mussamat Udey Kunwar* v. *Mussamat Ladu*(2), distinguished.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree of R. K. Bal, Subordinate Judge of Sinnar.

The facts of the case were as follows:—

The land in dispute and another of equal value belonged to and were mortgaged without possession by one Rakhma Lohar in 1893 to plaintiff's brother Rupchand for Rs. 200. Rakhma Lohar died in the year 1900 leaving him surviving his widow Baku, defendant 1, and two minor sons Piraji and Tatya, defendants 2 and 3. At a partition between the plaintiff and his brother the mortgage bonds fell to the plaintiff's share.

* Second Appeal No. 333 of 1911.

(1) (1909) 34 Bom. 175.

(2) (1870) 6 Beng. L. R. 283.

About ten years after the mortgage, that is, in the year 1903, the plaintiff obtained a sale-deed of one of the lands from defendant 1 in full satisfaction of the mortgage debt. The debt was settled at Rs. 300, the actual amount being Rs. 400, and Rs. 100 were added for payment to plaintiff's brother Rupchand who had obtained a decree against the defendants for about Rs. 172 and had attached their properties. The proceedings in execution were transferred to the Collector who let out both the properties to one Piraji at Rs. 31 per year and thus arranged for the satisfaction of the debt in six years. The plaintiff could not induce his brother to accept Rs. 100 in full satisfaction of his decretal debt. So Piraji, the tenant of the Collector, was induced to give up the lands and plaintiff himself got the lease in his favour and entered into possession. The plaintiff paid four years' rent, but he having made default in payment of the fifth year's rent in time, he was ejected and the lands were given in the possession of defendant 1. The plaintiff, therefore, brought the present suit against the defendants, alleging that he was the owner and was wrongfully dispossessed by the defendants.

The defendants answered that the property was their ancestral property and was not purchased by the plaintiff; that there being an old balance of debt due to plaintiff, he by undue influence as a creditor obtained a sale-deed from defendant 1, the transaction being in reality a mortgage. The defendants, therefore, prayed for accounts and redemption.

The Subordinate Judge found that the sale-deed of 1903 was executed by defendant 1 as a *sale-deed; that there was no* fraud on plaintiff's part as alleged by defendant 1; that the transaction was not a mortgage in any way; that defendant 1 was justified in selling the plaint property to plaintiff and the sale was binding upon defendants 2 and 3, and that the plaintiff was not wrongfully dispossessed by the defendants, but he was entitled to a declaration of his full title to the property by purchase. He, therefore, passed the following decretal order :—

I, therefore, declare that plaintiff is the full owner by purchase of this property and order that defendants do deliver possession thereof on or before 15th March 1910. Parties to bear their own costs.

1912.

MAGNIRAM VITHURAM v. BAKUBAI.

On appeal by the defendants the District Judge reversed the decree and dismissed the suit. His reasons were as follows :—

It is admitted that this arrangement as to the sale and settlement of the decretal debt was entirely unknown to the Collector : *a fortiori*, then, there was no written permission of the Collector to sell . the Collector was at the time of the sale, it is admitted, exercising powers under what is now section 7, Schedule III, of the Code of Civil Procedure. Accordingly the sale was in contravention of section 11 of that schedule and the defendants were incompetent to sell. Plaintiff's sale-deed, therefore, confers no title on him. He is not entitled to possession under that sale-deed now or at any future time

The plaintiff preferred a second appeal.

P. D. Bhide and *H. V. Athavale* for the appellant (plaintiff).

P. B Shingne for respondent 1 (defendant 1).

SCOTT, C J. :—The facts necessary for the disposal of this case are concisely stated by the District Judge. The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor. The plaintiff's brother attached the family lands. The matter went in execution to the Collector. The Collector leased the family lands to one Piraji The plaintiff and the defendants came to an agreement by which the plaintiff agreed to remit his debt he being a mortgagee and to pay off his brother the judgment creditor, and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants and he now sues to recover possession.

The lower Court found that the defendant 1 executed the sale-deed in suit and that it was intended to convey the interests of the defendants by way of sale, that there was no fraud, that the sale was binding on the minor defendants, and that the plaintiff was entitled to possession after the expiration of the lease of Piraji

At the hearing in the District Court arguments were confined to the point whether the sale was void It was ... arrangement as to sale and settlement of ... entirely unknown to the Collector and

that the Collector was at the time of the sale exercising his powers under section 325A The learned District Judge holds that upon these facts the sale was in contravention of the provisions of the Civil Procedure Code and that the defendants were incompetent to sell, that the plaintiff's sale-deed, therefore, conferred no title on him and he was not entitled to possession under that sale-deed then or at any future time.

There is no doubt that the effect of section 325A would be to invalidate such a sale as we now have to consider as against a lessee or transferee from the Collector exercising his powers under the Civil Procedure Code: see *Ganga Prasad* v. *Ganga Bakhsh Singh*[1]. But that does not dispose of the question whether, after the Collector's powers have ceased by reason of the proceedings in attachment being closed, the conveyance of the defendants' interest will not take effect in favour of the purchaser. The statutory provisions bearing upon the point are section 43 of the Transfer of Property Act: "Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists"; and section 18 of the Specific Relief Act which provides that where a person contracts to sell certain property having only an imperfect title thereto, the purchaser has the right, if the vendor has subsequently to the sale acquired any interest in the property, to compel him to make good the contract out of such interest.

In the present case it is not disputed that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer; and this circumstance distinguishes the case from that reported in *Gangabai* v. *Baswant*[2] and *Mussamat Udey Kunwar* v. *Mussamat Ladu*[3], for we are not concerned with

(1) (1907) 29 All. 415 (2) (1909) 31 Bom. 175.
(3) (1870) 6 Beng L. R 283.

12.

HIRAM
JRAM
v.
BAI

any interest other than the interest which the defendants purported to convey. Under these circumstances we think that the defendants, after the incompetence has been removed, could be compelled to make good to the plaintiff the interest which they purported to convey under the sale-deed. In *Holroyd* v. *Marshall*[1] it is stated, "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired . . . For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained" Upon the same principle a *vatandar* incompetent without the sanction of Government to mortgage his *vatan* land has been held estopped as against the mortgagee from denying his title to mortgage, *Narayan Khandu Kulkarni* v. *Kalgaunda Birdar Patel*[2], and an occupancy tenant incompetent to transfer without the consent of the *khot* has been estopped from contending that the consent had not been obtained: see *Hillaya Subbaya* v. *Narayanappa Timmaya*[3].

We, therefore, think that we should apply in this case the principle underlying section 18 of the Specific Relief Act and hold that now that the Collector has ceased to exercise his powers under the attachment, the conveyance by the defendants to the plaintiff must operate.

We reverse the decree of the District Court and restore that of the Subordinate Judge with costs throughout upon the defendants.

Decree reversed.

G. B. R.

(1) (1862) 10 H. L. C. 191 at p. 211. (2) (1889) 14 Bom. 404.
(3) (1911) 36 Bom 165

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell

THE AHMEDABAD UNITED PRINTING AND GENERAL AGENCY COMPANY, LIMITED (ORIGINAL PLAINTIFF), APPELLANT, v. ARDESIR KAVASJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1912. *March* 20

Family firm—Mortgage by manager—Suit upon the mortgage—Dismissal of the suit on the ground that the estate was not legally represented by the mortgagor on the date of mortgage—Reversal of the decree—Claim based upon a mortgage purporting to bind the partners in the firm and the mortgaged property.

One Kavasji Mancherji had three sons, Ardeshir, Phirojsha and Eruchsha. They constituted a family firm known as Kavasji Mancherji and Sons After the death of Kavasji, Ardeshir, in his capacity as the manager of the said firm, executed a *san* mortgage bond dated the 17th April 1899 to the plaintiff and it was attested by Eruchsha as one of the attesting witnesses. The mortgage debt was contracted for the purpose of paying off a judgment-creditor who had attached one of the family properties. The plaintiff having brought a suit for the recovery of the mortgage debt, the first Court dismissed the suit on the ground that the estate of Kavasji was not legally represented by Ardeshir at the time of the mortgage.

On appeal by the plaintiff,

Held, reversing the decree, that the mortgage debt could not be a debt of Kavasji because it was incurred after his death, therefore, it would not give rise to any claim against the estate of Kavasji. The claim was based upon a mortgage which purported to bind the partners in the firm of Kavasji Mancherji and Sons and a certain property which was specified in the mortgage. The interest which was intended to be conveyed in the mortgaged property was the interest of Ardeshir, Phirojsha and Eruchsha.

FIRST appeal against the decision of G. V. Saraiya, First Class Subordinate Judge of Ahmedabad, in suit No. 304 of 1909.

The facts were as follows:—

One Kavasji Mancherji and his three sons, Ardeshir, Phirojsha and Eruchsha, were the owners of a family firm styled Kavasji Mancherji and Sons. Kavasji Mancherji died on the 9th August 1890 and after his death his said three sons carried on business in the name of the firm. On the 17th April 1899 Ardeshir, in his capacity as the manager of the firm of Kavasji Mancherji and Sons, borrowed from the plaintiff

* First Appeal No. 3 of 1911.

1912.

AHMEDABAD UNITED PRINTING AND GENERAL AGENCY COMPANY, LIMITED v. ARDESIR KAVASJI.

Rs. 4,150 on a *san* mortgage bond which was attested by Eruchsha as one of the attesting witnesses. On the 5th May 1909 the plaintiff brought the present suit for the recovery of Rs. 6,787 due on the mortgage. The suit was brought against Ardeshir and Phirojsha as defendants 1 and 2, Bai Avabai, widow of Eruchsha, as defendant 3, and Framroj, son of Eruchsha, as defendant 4. Defendants 3 and 4 were joined as parties because they had obtained letters of administration to the estate of Eruchsha and also to the estate of Kavasji Mancherji

The plaintiff prayed for the recovery of the said amount of Rs. 6,787 with costs and interest by sale of the mortgaged property and asked that liberty should be given to him to apply for proceeding against the defendants personally in the event of the sale proceeds of the property being found to be insufficient.

Defendants 1 and 2 were absent though duly served.

Defendants 3 and 4 answered that they did not know if there was a firm doing business in the name of Kavasji Mancherji and Sons; that they did not know that defendant 1 was the *vahivatdar* (manager) of any such firm; that the estate of Kavasji Mancherji was not liable to the trade debts of defendant 1; that the estate of Kavasji was not liable in respect of transactions entered into by a person without obtaining letters of administration; that they had obtained letters of administration to the estate of Kavasji Mancherji; that the estate of Kavasji Mancherji was not liable for the debts of the firm, if any, in the name of Kavasji Mancherji and Sons; that the *san* mortgage bond in suit was not executed by deceased Eruchsha; that the estate of Kavasji had derived no benefit from the debt sued upon; that defendants 1 and 2 were not necessary parties, as the plaintiff sought to make the estate of Kavasji liable; that all the heirs of Kavasji were not on the record, and that the manager of the plaintiff Company and defendant 1 were acting in collusion.

The Subordinate Judge found that the *san* mortgage bond in suit was passed by defendant 1 not as *vahivatdar* (manager)

of Kavasji Mancherji and Sons but as *vahivatdar* of the ancestral estate of all the defendants; that on the date of the bond, the business was not done in the name of Kavasji Mancherji and Sons by defendant 1 as *vahivatdar*; that no such bond affecting the said property could be passed or any other act done respecting the same without obtaining letters of administration to the said property and the bond could not be given effect to, and that the plaintiff was not entitled to any relief. The Subordinate Judge, therefore, dismissed the suit.

The plaintiff appealed.

Setalvad with *G N. Thakore* for the appellant (plaintiff).

L. A. Shah for respondents 3 and 4 (defendants 3 and 4).

SCOTT, C. J.:—This is a suit upon a mortgage executed on the 7th of April 1899 purporting to be between Ardeshir Kavasji, Manager of the firm Kavasji Mancherji and Sons, at Ahmedabad, and Ranchodlal Gangaram, Manager of the United Printing and General Agency Company, Limited, who are the plaintiffs in this case.

The document is attested amongst other attesting witnesses by Eruchsha Kavasji, brother of Ardeshir, the executing party. Kavasji Mancherji, whose name is mentioned as that of the family firm, had three sons, Ardeshir, Phirojsha and Eruchsha; and it is not disputed that the money was raised from the mortgagee for the purpose of paying off a judgment-creditor who had attached one of the family properties.

The learned Subordinate Judge holds that at the time of the mortgage it is satisfactorily proved, upon the admissions of Eruchsha, that Ardeshir was in the *vahivat* of the estate of Kavasji Mancherji on behalf of Eruchsha and Phirojsha and with their consent, and that the deed is of such a character as to bind part if not the whole of the estate of Kavasji, but he thinks that the plaintiff's suit must fail because the estate of Kavasji was not legally represented by Ardeshir at the time when he passed the *san* bond in 1899.

Now the mortgage debt could not be a debt of Kavasji because it was incurred after Kavasji's death. And, according

1912

AHMEDABAD UNITED PRINTING AND GENERAL AGENCY COMPANY, LIMITED v. ARDESIR KAVASJI.

to the rule enunciated in *Farhall* v. *Farhall*[1], it would not give rise to any claim against the estate of Kavasji. Therefore section 190 of the Indian Succession Act to which reference is made by the Subordinate Judge has no application.

We are not concerned with a claim enforcible against the estate of Kavasji whether it be represented or unrepresented. We are concerned with the claim which is made upon a mortgage which purports to bind the partners in the firm of Kavasji Mancherji and Sons, and a certain property which is specified in the mortgage The partners in Kavasji Mancherji and Sons so long as that firm continued were Ardeshir, Phirojsha and Eruchsha, and from the point of view of the mortgagees it is absolutely immaterial whether the firm was a going concern or whether it was not, because, it is quite clear that the interest which was intended to be conveyed in the mortgaged property was the interest of Ardeshir, Phirojsha and Eruchsha.

It is not disputed that the beneficial interest in the property which is the subject of the mortgage and the beneficial interest in the other immoveable property of Kavasji is in the mortgagors subject to the satisfaction of the claims of their sister under a consent-decree which has recently been passed in this Court, and it is clear that under the provisions of section 43 of the Transfer of Property Act the mortgagors upon getting the beneficial interest in this property are bound to satisfy the mortgagee's claim out of that interest. Even if the administration suit had proceeded and had not been closed by the final consent-decree, we think that the mortgagee would have been entitled to come in in the suit and ask that the properties should be marshalled in order that his mortgage should be given effect to and that the other properties should be applied to satisfy the claims on Kavasji's estate. But under the present circumstances there is no difficulty in satisfying the claim of the mortgagee out of the property mortgaged.

The only other objection which was raised was that it was not satisfactorily proved that Eruchsha was bound by the mortgage.

(1) (1871) L. R. 7 Ch. 123.

We have, however, the fact that he was an attesting witness. He was a Government servant who must have understood the effect of the deed which he was attesting and which was executed by his brother who was in *vahivat* of all the family properties. The occasion of the mortgage was the necessity of raising the attachment on the family property before the marriage ceremony of one of Eruchsha's own daughters took place, and we have the uncontradicted statement of Ardeshir upon oath that Eruchsha consented to this mortgage.

For these reasons we reverse the decree of the Subordinate Judge and decree that the plaintiff will be entitled to an order that if the money due under the mortgage is not paid within six months from this date with costs and interest at the mortgage rate, the interests of Ardeshir, Phirojsha and Eruchsha's heirs in the mortgaged property be sold and that the proceeds be applied in satisfaction of the decretal debt.

Costs of this suit and appeal must be added to the mortgage debt.

Interest will run at mortgage rate up to the date of payment.

The pleaders to settle the amount of the mortgage claim.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

GOVINDJI VIRAMJI (original Defendant No. 3), Appellant, v. SAKHARAM GOVINDA (original Plaintiff), Respondent.*

1911. *November 9.*

Civil Procedure Code (Act XIV of 1882), sections 324A, 272, 285—Execution of decree—Money lying with Collector—Prohibitory order upon Collector by another Court—The executing Court attaching the money in execution of another decree—Payment to the decree-holder—Remedy of the first decree-holder at whose instance prohibitory order was issued—Practice and procedure.

Ramchandra and others obtained a decree against Shambu and another in the Court of the Subordinate Judge, Second Class, at Chalisgaon. Those decree-

* Second Appeal No. 441 of 1910.

1911.

GOVINDJI VIRAMJI v. SAKHARAM GOVINDA.

holders having applied for execution by attachment and sale of certain lands, the Court transferred the decree for execution to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). The Collector executed the decree and held the amount for payment to the decree-holders. In the meantime, the plaintiff obtained a decree for money against Ramchandra and others in the Court of the Subordinate Judge, First Class, at Dhulia; and in execution of the decree obtained attachment of the amount with the Collector by means of a prohibitory order under section 272 of the Code. About this time, the defendant obtained a decree against Ramchandra and others in the Court of the Subordinate Judge, Second Class, at Chalisgaon; and in execution of his decree obtained an order of attachment of the said amount. In obedience to this second order the amount was remitted to the Chalisgaon Court, where it was paid to the defendant. The plaintiff sued to recover the money. The lower appellate Court applied the provisions of section 295 and decreed the plaintiff's claim.

Held, dismissing the plaintiff's suit, that it was governed not by the provisions of section 295 but by those of section 324A of the Civil Procedure Code (Act XIV of 1882).

Held, further, that the prohibitory order passed by the Dhulia Court under the provisions of section 272 was *ultra vires* and could not bind the Collector in view of the provisions of section 324A under which he was acting.

Held, also, that in virtue of section 324A of the Civil Procedure Code (Act XIV of 1882) the Collector held the amount "at the disposal of the Court" (at Chalisgaon) which had transferred to him the decree for execution and which was bound to dispose of the amount in the manner and for the purposes mentioned in the third paragraph of that section; that it was open to the plaintiff to apply to the Court at Chalisgaon through the Court at Dhulia for rateable distribution under section 295; and that according to the provisions of section 324A, the Collector owed a special duty to the Chalisgaon Court and that Court alone had jurisdiction to deal with all questions as to the disposal of the amount.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Dhulia, reversing the decree passed by J. Scotson, Assistant Judge of Dhulia

Suit to recover a sum of money.

The claim arose under the following circumstances. Ramchandra and others obtained two decrees against two persons Shambu and Motiram, in the Court of the Subordinate Judge, Second Class, at Chalisgaon. They applied to execute the decrees by attachment and sale of the lands belonging to the judgment-debtors. The Court transferred the proceedings to the Collector under the provisions of section 320 of the Civil Procedure Code (Act XIV of 1882). The property was sold by

the Mamlatdar (defendant No. 2) on behalf of the Collector, who held the money for the decree-holders.

In the meantime the plaintiff Sakharam Govind obtained a decree for money against Ramchandra and others in the Court of the Subordinate Judge, First Class, at Dhulia. He applied to execute his decree and obtained attachment of the money in the hands of the Mamlatdar, by means of a prohibitory order issued under section 272 of the Civil Procedure Code, 1882. The prohibitory order was served on the Mamlatdar on the 19th March 1907.

The defendant No. 3, Govindji Viramji, also obtained a decree against Ramchandra and others in the Court of the Subordinate Judge, Second Class, at Chalisgaon He applied to execute his decree by attachment of money in the hands of the Mamlatdar. Accordingly attachment was levied on the 12th April 1907. The Mamlatdar and the Aval Karkun (defendants Nos 1 and 2) remitted the money to the Chalisgaon Court, where it was paid over to defendant No. 3.

The plaintiff filed the present suit against the Mamlatdar and the Aval Karkun and against Govindji Viramji, alleging that the first two defendants forwarded the amount to the Chalisgaon Court, in disobedience of the orders of the Dhulia Court, with the intention of injuring the plaintiff; and that the defendant No. 3 wrongly withdrew the amount.

The Assistant Judge who tried the suit, exempted the defendants Nos. 1 and 2 from liability on the ground that the defendants Nos. 1 and 2 were protected by the fact that they paid the money in good faith and in pursuance of the lawful orders of the Chalisgaon Court. As regards the defendant No. 3 he held that he was not liable to refund the money received by him in satisfaction of a valid subsisting decree, even though there might be some irregularity in the method of securing the payment.

On appeal, the District Judge upheld the decree so far as the defendants Nos. 1 and 2 were concerned. As regards defendant No. 3, he held that he was liable at the plaintiff's suit, for the money in the hands of the Mamlatdar having been properly

1911.

GOVINDJI VIRAMJI v. SAKHARAM GOVINDA.

and effectively attached by the plaintiff, the defendant No. 3 had no right to receive it. The learned Judge then applied the provisions of section 295 of the Civil Procedure Code of 1882 and distributed the amount rateably between the plaintiff and defendant No. 3.

Against this decree, the plaintiff appealed on the ground that the defendants Nos 1 and 2 were wrongly exempted from liability; and defendant No. 3 appealed on the ground that the lower appellate Court erred in ordering rateable distribution.

N. V. Gokhale, for the plaintiff.

G. S. Rao, Government Pleader, for defendants Nos. 1 and 2.

R. R. Desai, for defendant No. 3.

CHANDAVARKAR, J. :—In applying section 285 of the old Code of Civil Procedure (Act XIV of 1882) to the facts of the case, the learned District Judge, from whose decree, reversing that of the Assistant Judge, these second appeals have been preferred, has overlooked the provisions of section 324A of the said Code.

The salient facts are these. One Ramchandra and others had obtained decrees, Nos. 178 and 179, in the Court of the Second Class Subordinate Judge at Chalisgaon against two persons. Those decree-holders having applied for execution, by attachment and sale of certain lands, that Court transferred the decrees for execution to the Collector under section 320 of the Code. The Collector in execution realised Rs. 2,785 and held that amount for payment to the decree-holders. The amount was in the actual custody of the Mamlatdar on behalf of the Collector.

In the meantime the present respondent, who had obtained a decree for money against the abovementioned decree-holder Ramchandra Govind and others, in the Court of the Subordinate Judge, First Class, at Dhulia, applied to that Court for, and obtained attachment of, the amount in the hands of the Mamlatdar by means of a prohibitory order under section 272 of the Code, served on the latter on the 13th of March 1907.

The present appellant, who also held a decree against the same decree-holders, Ramchandra Govind and others, obtained in the Court of the Subordinate Judge, Second Class, at Chalisgaon, applied to that Court, on the 12th of April 1907, for and obtained an order of attachment of the amount in the hands of the Mamlatdar. And in obedience to this order, the Mamlatdar remitted the amount to that Court. The amount was paid by the Court to the appellant accordingly.

Neither section 272 nor section 285 has any application to these facts. Whether the amount be regarded as having been in the custody of the Court at Chalisgaon or in that of the Mamlatdar on behalf of the Collector is immaterial. In either case, the custody was held subject to certain conditions prescribed by the provisions of section 324A of the Code. In virtue of that section, the Collector held the amount "at the disposal of the Court" which had transferred to him the decree for execution. That was the Court at Chalisgaon. That Court, again, was bound to dispose of the amount in the manner and for the purposes mentioned in the third paragraph of that section. It was open to the respondent to apply to the Court at Chalisgaon through the Court at Dhulia for rateable distribution under section 295; and under clause 2 of the third paragraph of section 324A the former Court could have ordered such distribution in its discretion. According to the provisions of the section, the Collector owed a special duty to that Court, and that Court alone had jurisdiction to deal with all questions as to the disposal of the amount. The prohibitory order of the Dhulia Court could not bind the Collector in the presence of the provisions under which alone he was authorised by the Statute to act and was acting, and, therefore, that order was *ultra vires*. The respondent's title resting solely on that order, and the order failing, the decree must be reversed and that of the Assistant Judge restored with costs of this second appeal and the appeal in the District Court on the respondent.

Decree reversed.

R. R.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.
January 31.

EMPEROR v. CHHOTALAL BABAR.*

Indian Penal Code (Act XLV of 1860), sections 34, 109, 467—Forgery—Abetment of forgery—Abetment by conspiracy—Conspiracy at Cambay, foreign territory—Consequent forgery committed in British India—Trial in British India of the foreigner who conspired to forge at Cambay and who was in Cambay when the forgery was committed in British India—Jurisdiction.

The accused was a subject of the Cambay State. He lived there and traded with his business partner A. He conspired with A at Cambay and sent A to a professional forger at Umreth (a place in British India) with instructions to instigate the latter to forge a valuable security. To facilitate the forgery, the accused sent his *khata* book with A. In pursuance of A's instigation the forgery was committed at Umreth. On these facts, the accused was charged, in a Court in British India, with the offence of abetment of forgery under sections 467 and 109 of the Indian Penal Code. The trying Judge referred to the High Court the question whether the accused, not being a British subject, was amenable to the jurisdiction of his Court:—

Held, that the Court in British India had jurisdiction to try the accused, for the accused's offence was not wholly completed within Cambay limits, but having been initiated there, was continued and completed within the British territory of Umreth.

Where a foreigner starts the train of his crime in foreign territory, and perfects and completes his offence within British limits, he is triable by the British Court when found within its jurisdiction.

Section 34 of the Indian Penal Code provides not only for liability to punishment but also for subjection of a conspirator to the jurisdiction of a Court though he conspires at a place beyond the jurisdiction.

THIS was a reference made by C. N. Mehta, Additional Sessions Judge at Ahmedabad.

The accused, Chhotalal Babar, a subject of the Native State of Cambay, was charged in the Sessions Court of Ahmedabad (a Court in British India) with the offence of abetment of forgery, punishable under sections 467 and 109 of the Indian Penal Code.

The case for the prosecution was as follows. The accused Chhotalal Babar desired to get a certain valuable security,

* Criminal Reference No. 107 of 1911.

namely a *khdta*, forged in the name of one Ambalal Nanalal of Cambay. He accordingly took into his confidence his partner in trade Ambalal Jethalal and having conspired with him at Cambay sent him to Umreth to a professional forger Somnath Ranchhod to get the *khdta* forged. In pursuance of the common object of the conspiracy, Ambalal Jethalal went to Umreth (a place within British India) and there instigated Somnath to commit the forgery. Somnath forged the *khdta* at Umreth.

Under these circumstances, Chhotalal Babar, Ambalal Jethalal and Somnath Ranchhod were placed for trial before the First Class Magistrate of Kaira. The Magistrate, in the course of the inquiry before him, gave a pardon to Somnath under section 337 of the Criminal Procedure Code, and examined him as a witness. The case then proceeded only against Chhotalal and Ambalal. The Magistrate after finishing his inquiry committed the case against the two accused to the Court of Session at Ahmedabad. In that Court, the case first went on against Ambalal Jethalal, who was found guilty and sentenced to suffer rigorous imprisonment for three years.

As regards Chhotalal Babar, the facts stood thus. He was not a British subject, but a subject of the Native Indian State of Cambay. He conspired at Cambay with Ambalal Jethabhai to get a *khdta* forged at Umreth and furnished him with his *khdta* book for the purpose. Accordingly, Ambalal proceeded to Umreth and had there a *khdta* forged by a professional forger.

The Additional Sessions Judge of Ahmedabad, being of opinion that the British Courts in India had no jurisdiction to try the accused Chhotalal for the offence of abetment of forgery, did not proceed with his trial, but referred the case to the High Court for quashing the commitment under section 215 of the Criminal Procedure Code.

The Reference was heard.

G. S. Rao, Government Pleader, for the Crown :—We submit that the Court in British India has jurisdiction to try the accused. The act, though it originated in Cambay, was com-

1912.

EMPEROR v. CHHOTALAL BABAR.

pleted at Umreth in British India. The abetment by the accused was therefore completed at Umreth. Further, under section 34 of the Indian Penal Code, the accused must be deemed to have done what Ambalal did in British India. If the accused had sent a letter from Cambay to Umreth for the purpose by post, he would have acted in British India. The mere fact that he employs an agent to accomplish his purpose cannot make any difference. See *Queen-Empress* v. *Sheo Dial Mal*[1]; *Rex* v. *Brisac and Scott*[2]; *Rex* v. *Munton*[3]; *Reg.* v. *Bull and Schmidt*[4]; *Reg.* v. *Taylor*[5]; *Reg.* v. *Ellis*[6]; *Reg.* v. *Rogers*[7]; *Rex* v. *Oliphant*[8]; *Rex* v. *De Marny*[9]; *R.* v. *VonVeltheim*[10]; *Reg.* v. *Keyn*[11]; Russell on Crimes, Vol. I, pp. 55-58 (7th Edn.). The case of *Reg.* v. *Pirtai*[12] is distinguishable, as the act of abetment there was wholly completed in British India.

L. A. Shah, for the accused:—The accused who is a subject of Cambay, a foreign territory, is not amenable to the Indian Penal Code in British India unless he has done any act in British India. All that the accused did here was to hand over his account book to his partner Ambalal at Cambay and to ask him to get a *khâta* forged. Thus the accused's act in the offence was completed at Cambay. He cannot be tried for it in British India, for abetment is an offence by itself under the Indian Penal Code. See *Reg.* v. *Pirtai*[12] and *Queen-Empress* v. *Sheo Dial Mal*[1].

If Cambay had been British territory, then the accused could, under section 179 of the Criminal Procedure Code, have been tried in the Kaira district. But unless the legislature enacts specially, as it has done in section 121A of the Indian Penal Code, that the accused is liable for acts done outside British India, he cannot be tried in British India for acts committed

(1) (1894) 16 All. 389.
(2) (1803) 4 East 164.
(3) (1793) 1 Esp. 62.
(4) (1845) 1 Cox Cr. Ca. 281.
(5) (1865) 4 F. & F. 511.
(6) [1899] 1 Q. B. 230.
(7) (1877) 3 Q. B. D. 28.
(8) [1905] 2 K. B. 67.
(9) [1907] 1 K. B. 388.
(10) (1908) Russell on Crimes, Vol. I, p. 55 (7th Edn).
(11) (1876) 2 Ex. D. 63.
(12) (1873) 10 B. H. C. R. 356.

1912.

EMPEROR
v.
CHHOTALAL
BABAR.

outside. The cases relied on by the other side are all distinguishable on that ground. I rely on: *Reg.* v. *Keyn*[1]; *Mussummat Kishen Kour* v. *Crown*[2]; *Roda* v. *Empress*[3]. There is a difference between a man sending a letter by post or telephone message and his acting through an agent. See Russell on Crimes, p. 75, and the remarks of Cockburn, C. J., in *Keyn's case.*

BATCHELOR, J. :—The point of law referred to us arises in the following state of facts. The accused, Chhotalal Babar, is a subject of the Cambay State. He lived in Cambay and there traded with his business partner Ambalal Jethalal. In May 1910 the accused, conspiring with Ambalal, sent Ambalal to a certain professional forger, by name Somnath Ranchhod, living in Umreth, with instructions to instigate Somnath to forge a valuable security, namely a *kháta*. To facilitate the forgery, the accused sent his *kháta* book with Ambalal to Somnath. Somnath committed the forgery in pursuance of Ambalal's instigation. The accused was charged on these facts before the Additional Sessions Judge of Ahmedabad with the offence of abetment of forgery under sections 467 and 109, Indian Penal Code, and the learned Judge, Mr C. N. Mehta, has referred to us the question whether upon these facts the accused, not being a British subject, was amenable to the jurisdiction of the Ahmedabad Court. After a careful examination of the subject the Judge records his own opinion that the accused was not triable by the British Court.

In support of that opinion the learned Judge largely relied, and the accused's pleader before us has also relied, on this Court's decision in *Reg.* v. *Pirtai*[4]. It appears to me, however, that that decision, so far from assisting the present accused, indicates the line of reasoning upon which the present reference ought to be determined against him. For in that case the *ratio decidendi* that the then accused woman, a foreigner, was not triable by the British Court was that her instigation of the crime had been "wholly committed within

(1) (1876) 2 Ex. D. 63 at p. 160
(2) (1878) P R No 20 of 1878 (Cr)
(3) (1889) P. R. No 30 of 1889 (Cr)
(4) (1873) 10 Bom. H C. R. 356.

1912.

EMPEROR v. CHHOTALAL BABAR.

the foreign territory." If, therefore, the present accused's offence was not wholly completed within Cambay limits, but, having been initiated there, was continued and completed within the British territory of Umreth, then *Pirtai's case* would be authority for the view that the accused was triable at Ahmedabad; and the learned Government Pleader's argument is that this is the true view of the present case.

Turning to section 107 of the Indian Penal Code, which defines abetment, and confining ourselves to that part of the definition with which alone we are now concerned, we find that "a person abets the doing of a thing who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act takes place in pursuance of that conspiracy, and in order to the doing of that thing." It will be seen that there are two requisites: first, the engaging with another, and, secondly, the doing of some act in pursuance of the conspiracy. Further, under explanation 4 to section 108 of the Indian Penal Code, the accused, who abetted Ambalal in abetting Somnath to forge, is punishable as an abettor of the forgery. Now, admittedly, the accused's engaging with the intermediate conspirator, Ambalal, took place in Cambay, but under the definition that was not the complete offence of abetment: the offence was completed only when the consequent act was done. What, then, was that act in this case? Mr. Shah for the accused has urged that it should be regarded as consisting of the entrusting of the accused's *khâta* book to Ambalal, but I cannot take that view. It appears to me that the act contemplated by the definition was in this case Ambalal's instigation of Somnath in Umreth. It is argued that this is to mistake the ultimate "thing done"—*i. e.*, the final object of the conspiracy—for the intermediate act of mere facilitation; but I do not think so. The ultimate thing done here was Somnath's forgery of the *khâta*, and, as I have shown, the accused is punishable as an abettor of that forgery. Thus, the language of the Code seems to me not to conflict with, but to support, the view that the act done in pursuance of the accused's conspiracy with Ambalal was, not the accused's own

contemporaneous act of handing over his account-book to Ambalal, but Ambalal's act in instigating Somnath in Umreth.

If I am right so far, then on principle and on authority I am of opinion that Ambalal's instigation of Somnath was in law instigation by the accused, so that the case we have is that of a foreigner who, having started the train of his crime in foreign territory, perfects and completes his offence within British limits; and in such circumstances he is, I think, triable by the British Court when found within its jurisdiction.

As we are dealing with a conspiracy, section 34 of the Indian Penal Code applies, and each of the conspirators is liable for any or all of the acts of the others done in pursuance of the common intention. It is urged that this section provides only for liability to punishment, not for subjection to another jurisdiction; but it appears to me that the authorities show otherwise. *Rex* v. *Brisac and Scott*[1] was a case of conspiracy between the captain and the purser of a man-of-war for fabricating false vouchers to cheat the Crown The fabrication was done on the high seas, but the Commissioners of the Navy had received in Middlesex some of the false vouchers which had been transmitted by one of the defendants through the medium of the post It was held that the offence was triable in Middlesex, and Sir Nash Grose, J , in delivering the Court's judgment upon the objection as to jurisdiction, cited *King* v. *Bowes and others* as authority for the principle that "the conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy in the county where the trial was had"; and the learned Judge proceeds to lay down that the delivery of the false vouchers was an offence in the place, Middlesex, where the vouchers were delivered, and that such delivery was the act of both the defendants, even though the delivery was made mediately through innocent persons, and the letter

(1) (1803) 4 East 164.

1912.

EMPEROR v. CHHOTALAL BABAR.

containing the bill of exchange had been put in the post by only one of the defendants. In *Rex* v. *Munton*[1] the defendant, who was the principal store-keeper at Antigua, bought certain stores in England at a nominal price agreed between him and the sellers, and then charged to Government this full nominal price, misappropriating the deductions allowed to him by collusion with the sellers. On the question of jurisdiction Lord Kenyon held that " the objection would be good where the criminal matter arose wholly abroad," but here the false charges made by the defendant were contained in the several returns made by him to the Navy Office in London, and his Lordship therefore said " that there was an offence committed in London where such false returns were received, and where the fraud had been complete by their having been there allowed ; " and he accordingly overruled the objection. This case was followed in *Rex* v. *Oliphant*[2], where the defendant, being employed in Paris by a London firm to manage their Paris branch, fraudulently misappropriated certain sums received, having omitted to enter them in certain slips which it was his duty to transmit to London in order that the amounts might be incorporated in the London cash-book. It was held that he was triable at the Central Criminal Court, as his false returns had been received in London : " the receipt of the slips in London," said Ridley, J., " makes the offence complete in London ".

It was urged that in the foregoing cases the accused person was a British subject, but I do not think that that circumstance makes any difference to the principle of the decisions. It seems to me to be immaterial whether the accused person was bodily present in British territory when the offence was completed or whether his presence there and then is derived by process and intendment of the law : in either case he is present in British territory committing an offence under the Indian Penal Code, and, that being so, his character as a foreigner cannot avail him. In support of this position reference may be

(1) (1793) 1 Esp 62. (2) [1905] 2 K. B 67.

made to *Rex* v. *De Marny*[1] where the defendant, an editor, inserted in his newspaper advertisements which related, as he knew, to the sale of obscene books by foreigners resident abroad. He was convicted in London of causing and procuring obscene books to be sold and published On the objection as to the jurisdiction the argument for the defendant was that the defendant, if guilty of anything, was guilty of aiding and abetting the sale of indecent books, and on that footing would be indictable as a principal in the second degree; but that, counsel contended, could not be so, because the real vendors, the principals in the first degree, were foreigners resident abroad and so not amenable to the jurisdiction. In reply counsel for the prosecution relied on *Rex* v *Oliphant*[2] and contended that even a foreigner abroad, who, through his innocent agent, the postman, caused the publication of indecent literature in England, committed an offence against the law of England, and could be convicted if he came within the jurisdiction; in other words, that the defendant in *Rex* v. *Oliphant*[2] would have been equally triable in London if he had been a foreigner. This argument was accepted by the Court and, in my opinion, completes the case against the present accused. For this and the other authorities cited seem to me to establish the proposition that where a foreigner in foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed.

I may add that I am confirmed in this view of the case because the main proposition on which it depends—namely, that Ambalal's abetment in Umreth was, in law, the accused's abetment—seems to me to derive support from other considerations. In the first place the instigation was made in Umreth because the accused so willed it, and, as Bramwell J. A. said in *Reg.* v. *Keyn*[3] in speaking of wilful—as opposed to negligent—acts, "if the act was wilful, it is done where the will intends it should take effect." Then I cannot see how accused is in any

(1) [1907] 1 K. B. 388. (2) [1905] 2 K. B. 67.

1912.

EMPEROR v. CHHOTALAL JABAR.

better position than he would have been if, instead of using a *fellow-conspirator as his voice or means of communication*, he had used the post, or, if such a mechanical contrivance had existed, the telephone; indeed, that he used a fellow-conspirator and not an innocent or unconscious medium seems to me to make the train or sequence of his acts *more* uniform and continuous. *But if he had* sent a letter to the forger in Umreth and the forger had done his work in pursuance of the instructions in the letter, I cannot doubt that accused would have been liable for abetment of the forgery in Umreth on the footing of his being present in Umreth at the material time. Thus, in *Rex* v. *Oliphant*[1] Lord Alverstone, C. J., said: "I am unable to draw any *distinction between sending information* by post or by telephone and giving the same information by direct personal communication." And in *Reg.* v. *Rogers*[2] Field, J., observes that for the purpose of giving jurisdiction a letter speaks continuously from the moment of its being posted until its receipt by the addressee, and "the reasoning", he says, "is in this way: a letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place *outside* the boundary *of* a county into another county with intent to injure a person in *that county, the offence* is committed in the county within which the blow is given. So with a letter." And so, it seems to me, with the instigation *which the* accused here, through human agency, conveyed *from* Cambay to the forger in Umreth. There was one continuous act which was completed in Umreth, *and for that act*, so completed within *British territory*, the accused was *triable* by the *British Court*. The question referred should, I think, be decided accordingly.

CHANDAVARKAR, J.—I concur *Answer accordingly.*

R. R.

(1) [1905] 2 K. B. 67. (2) (1877) 3 Q. B. D. 28.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

YAMNAVA KOM GOVIND APPAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* LAXMAN BHIMRAO KULKARNI AND OTHERS (ORIGINAL PLAINTIFF AND OTHERS), RESPONDENTS.*

1912. *February 5.*

Hindu Law—Adoption—Rule that the adopted boy should be such that his mother could be legally married by the adopting father—Limits of the rule.

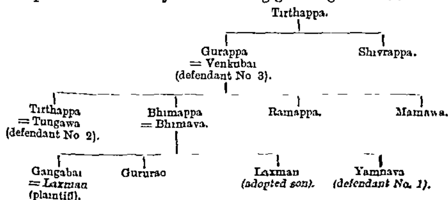
Under Hindu Law, the rule that no one can be adopted whose mother the adopter could not have legally married, is confined to the three cases of a daughter's son, a sister's son and a mother's sister's son.

Ramchandra v. *Gopal*(1), followed.

A person can validly adopt the son of his mother's brother.

SECOND appeal from the decision of F. X DeSouza, District Judge of Bijapur, confirming the decree passed by Vishvanath V. Wagh, First Class Subordinate Judge, at Bijapur.

The plaintiff claimed to recover possession of certain property, alleging that he was the adopted son of Bhimappa, to whom the property belonged. Bhimappa died leaving him surviving a son Gururao, who died three days after him. The plaintiff alleged that he was adopted by Bhimava (widow of Bhimappa), on the 19th March 1902. The plaintiff was a son of the brother of Venkubai (defendant No 3) who was the mother of Bhimappa. He was also married to Gangabai (a daughter of Bhimappa) who had predeceased her father. The plaintiff's claim was resisted by Yamnava (a daughter of Bhimappa) (defendant No. 1) and Tungawa (defendant No. 2), who was the widow of Tirthappa, a brother of Bhimappa The relationship between the parties is shown by the following genealogical tree :—



* Second Appeal No. 980 of 1910.

(1) (1908) 32 Bom. 619.

1912.

YAMNAVA v. LAXMAN BHIMRAO.

Defendants Nos. 1 and 2 contended *inter alia* that the plaintiff could not be legally adopted.

The lower Court held that there was no objection in law to the plaintiff's adoption and relied on *Ramchandra* v. *Gopal*[1]. The plaintiff's claim was decreed.

Defendant No. 1 appealed to the High Court.

D. A. Khare, for the appellant.

Jayakar with *N. V. Gokhale*, for the respondent, were not called on.

CHANDAVARKAR, J.—The question of Hindu Law which has been argued before us is covered by direct authority in the case of *Ramchandra* v. *Gopal*[1] and it would be impossible for us to differ from the law propounded in the judgments there, unless we were clearly satisfied either that the conclusion was obviously opposed to the texts in Hindu Law, or opposed to any earlier case decided by this Court or by the Judicial Committee of the Privy Council. That the decision in question decided the point as one arising before it directly for the first time is unquestionable. That there is no earlier case either of this Court or of the Judicial Committee of the Privy Council deciding the point in direct terms is also undoubted.

Mr. Khare's learned argument invites us to put upon certain texts in the Dattaka Mimansa an interpretation different from that which has been put upon them by the judgments of Chaubal, J., and my learned colleague who forms a member of this Division Bench. If the texts on which Mr. Khare relies, namely, placita 16, 17, 18 and 19, of section 5 of the Dattaka Mimansa had stood alone, it might have been reasonable to interpret them in the way in which Mr. Khare has invited us to understand them. But in order to understand the meaning of a text-writer on Hindu Law we must read the whole of his work and find out whether there are other passages in the work which throw distinct light upon the passage under discussion.

(1) (1908) 32 Bom. 619.

Now, in the present case we have light thrown upon the placita referred to by other placita in the Dattaka Mimansa. In section 2, placita 107 and 108, Nanda Pandita, after discussing among other questions the question who is eligible for adoption, clinches the matter by citing the authority of *Cakala* who says: "Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a sapinda relation particularly: or also next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sister." And then in placitum 108, Nanda Pandita draws his conclusion · "By this it is clearly established that the expression 'sister's son' is illustrative of the daughter's son, and mother's sister's son, and this is proper, for prohibited connection is common to all three." 'Prohibited connection' here means what is called '*viruddha sambandha.*' Nanda Pandita in clear terms tells us that the words 'sister's son,' stand for the sister's son and also for the daughter's son and mother's sister's son and the implication is that they do not extend to any other son. Where a general rule is prescribed and an exception is made to it, the latter must be confined to the cases specified as falling within the exception. (See West and Buhler's Digest of Hindu Law: 3rd Edn., p. 880, note (c); the Mitakshara, Moghe's Edn, No 3, p 296.) If that is so, then it is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son.

Under these circumstances, I think, it is difficult to differ from the conclusion which was arrived at after careful consideration and discussion in the judgments in *Ramchandra* v. *Gopal*[1]. For these reasons I think that the law laid down there must be adhered to as the established rule of this Court. We must, therefore, confirm the decree with costs.

(1) (1908) 32 Bom 619.

1912.

YAMNAVA v. LAXMAN BHIMRAO.

BATCHELOR, J.:—As one of the Judges who took part in the decision in *Ramchandra* v. *Gopal*[1] I desire to add a word. Mr. Khare's argument before us has not been wanting either in subtlety or ingenuity, but having listened to all that he has said I am bound to say that I have heard nothing which could induce me to hold that the decision of Mr. Justice Chandavarkar and myself was not at least as reasonable and probable a view of the material passages in the Dattaka Mimansa, as is the view for which Mr. Khare has now contended. I do not suggest that the case is not susceptible of argument from Mr. Khare's point of view, but I do say, that in my opinion, the argument on the other side is at least as convincing. In these circumstances, and on the principle *stare decisis*, I am of opinion, that the appellant's argument on this point should be disallowed.

Decree confirmed.

R. R.

(1) (1908) 32 Bom. 619.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. *February 20.*

GOVIND RAMCHANDRA SHEMBEKAR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. VITHAL GOPAL SAHASRABUDHE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—Status of agriculturists—The question if not appealed from as preliminary decree cannot be agitated in appeal on merits—Party's duty to ask Court to draw up decree—Practice and procedure.

The plaintiffs brought a suit to redeem a mortgage according to the provisions of the Dekkhan Agriculturists' Relief Act, 1879. A preliminary issue was raised whether the plaintiffs were agriculturists, and decided against the plaintiffs. The Court ordered the plaintiffs to pay the requisite Court-fee within a week's time, which not having been done, the suit was dismissed. In the appeal which the plaintiffs preferred against the final decree they sought to question the finding on the preliminary issue :—

Held, that the preliminary decree having become extinct by reason of the final decree, and the plaintiffs not having exercised their right of presenting an appeal

* First Appeal No. 75 of 1911.

from that decree, it was not open to them in the present appeal to challenge the finding on the preliminary issue.

Held, further, that though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the plaintiffs to appeal, yet it was equally the duty of the plaintiffs to ask the Court to draw up that decree in order to enable them to present an appeal against it.

APPEAL from the decision of P. S. Pathak, First Class Subordinate Judge at Ratnagiri.

Suit to redeem a mortgage.

The plaintiffs brought a suit to redeem a mortgage under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), alleging that they were agriculturists. The defendants admitted the mortgage but contended *inter alia* that the plaintiffs were not agriculturists and disputed the amount found due on the mortgage.

In the Court below a preliminary issue was framed, whether the plaintiffs were agriculturists, within the meaning of the term as defined in the Dekkhan Agriculturists' Relief Act. The Court found this issue against the plaintiff and gave them one week's time to pay in the Court-fees. The Court-fee was not paid, and the suit was accordingly dismissed.

The plaintiffs appealed from the decree dismissing the suit. In the appeal they sought to attack the finding on the preliminary issue. Thereupon the respondent's pleader raised a preliminary objection that the plaintiffs, not having appealed from the preliminary decree, could not question its correctness in the appeal preferred against the final decree.

S. S. *Patkar*, for the appellants.

N. M. Patvardhan, for the respondents.

CHANDAVARKAR, J. —The appeal is preferred from a decree of the Subordinate Judge dismissing the suit under the following circumstances. The suit was brought by the appellants to redeem the property in dispute according to the provisions of the Dekkhan Agriculturists' Relief Act. The preliminary issue was raised in the Subordinate Judge's Court, whether the plaintiffs were agriculturists. That issue was found by the Subordinate Judge against the plaintiffs and he directed the

1912.

GOVIND RAMCHANDRA v. VITHAL GOPAL.

plaintiffs to pay the requisite Court-fee within one week from the date of that finding. That order for the payment of Court-fee not having been complied with, the Subordinate Judge dismissed the suit under Order XVII, rule 3. It has been held by the different High Courts that an order under section 158 of the old Code of Civil Procedure, which is the same as Order XVII, rule 3, is tantamount to a decree on the merits from which an appeal lies Therefore, the final order made by the Subordinate Judge dismissing the suit was a decree, and it is because it was a decree that this appeal is allowed by law.

In arguing the appeal the appellants' pleader challenges the correctness of the finding of the Subordinate Judge on the issue, whether the appellants are agriculturists. The objection is raised by the respondents' pleader, that the appellants should not be allowed to re-open that question decided against them and to contend that they are agriculturists entitled to take the benefit of the provisions of the Dekkhan Agriculturists' Relief Act. We think that the respondents' contention must be allowed.

The decree appealed from is not a preliminary decree, but it is a final decree. There was, no doubt, the finding on the preliminary issue whether the appellants are agriculturists or not, and the Court ought to have made a preliminary decree in terms of its finding on that issue. But no decree was drawn up. And though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the appellants to appeal, yet it was equally the duty of the appellants to ask the Court to draw up that decree in order to enable them to present an appeal to this Court. That duty the appellants failed to discharge in their own interests, and it is a reasonable inference to draw from it that they waived the right which the Legislature had given to them of presenting an appeal against the preliminary decree.

Section 97 of the present Code of Civil Procedure requires that an appeal should be preferred from a preliminary decree, and that, if it is not preferred, the party aggrieved shall not be

allowed to challenge the finding on the preliminary question in appeal on the merits of the suit. The intention of the Legislature was clearly to prevent preliminary questions being raised in the form of an appeal after the case had been decided upon the merits.

Now, here the preliminary decree having become extinct by reason of the final decree, and the appellants not having exercised their right of presenting an appeal to this Court from that decree, in the present appeal it is not open to the appellants to challenge the finding on the question whether they are agriculturists or not. The appellants' pleader, however, asks this Court to give them time to ask the lower Court to frame a preliminary decree in order to enable them to appeal against it. The Subordinate Judge has remarked in his judgment that this is an old case, and that it ought not to be allowed to linger on for nothing We think that the appellants have been guilty of laches, and no further indulgence ought to be granted to them

For these reasons the decree appealed from must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

GURBASAPPA BIN SANGAPPA KUNCHAGNUR (ORIGINAL DEFENDANT No. 3), APPELLANT, v. RANGO VENKATESH KHUSNIS AND ANOTHER (ORIGINAL PLAINTIFF), RESPONDENTS.*

Forfeiture by Government of Deshgat Inam lands—Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title.

The plaintiffs' ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855. The lands were in 1856 forfeited by Government; but the mortgagee was continued in possession and paid assessment in respect of

* Second Appeal No. 832 of 1910.

1912.

GURDASAPPA v. RANGO VENKATESH.

the lands to Government. In 1901, the plaintiffs sued to redeem the mortgage. The defendant contended that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant:—

Held, that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government; and that it did not deprive the plaintiff of all right and title to the lands, and extinguish the relation of mortgagor and mortgagee which existed between the parties.

Vishnoo Trimbuck v. *Tatia*[1] and *Gangabai* v. *Kalapa Dari Mukrya*[2], followed.

Held, also, that the defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun.

SECOND appeal from the decision of T. D. Fry, District Judge of Dharwar, amending the decree passed by V. V. Kalyanpurkar, Additional Subordinate Judge at Gadag

Suit to redeem a mortgage

In 1855, one Rango, an ancestor of the plaintiff, executed a usufructuary mortgage in favour of Rudrappa, an ancestor of defendant, of certain lands which were the Deshgat Inam lands. The mortgagee was placed in possession of the lands which consisted of three Survey Nos. 139, 64 and 66. The lands were confiscated by Government in 1856. The mortgagee, however, continued to pay assessment to Government for the lands. The plaintiffs brought a suit in 1901 to redeem the mortgage.

The defendant contended *inter alia* that the lands in question were confiscated by Government; and that the plaintiffs were not owners of the lands and had no right to sue.

The Subordinate Judge tried first a preliminary issue, "Is plaintiff owner of the lands in suit ?"; found it in the negative and recorded no findings on the remaining issues. On appeal, the District Judge reversed the finding and remanded the suit to the first Court for trial on the merits. On remand it was held that mortgage relied on by plaintiffs was proved; that the plaintiffs' right to redeem the mortgage was not extinguished; that the defendant was in adverse possession

(1) (1863) 1 Bom. H. C. R. 22 (2) (1885) 9 Bom. 419.

of Survey Nos. 64 and 66 for more than 12 years before suit; and that the plaintiffs were entitled to redeem Survey No. 139.

Against this decree both parties appealed. The District Judge varied the decree by holding that the plaintiffs were entitled to redeem all the three survey numbers.

The defendant appealed to the High Court.

Jayakar, with *P. M. Vinekar*, for the appellant.

The following cases were cited. *Dasharatha* v. *Nyahalchand*[1]; *Bhau* v. *Hari*[2]; *Bhima* v *Raghavendracharya*[3]; and *Amolak Banechand* v. *Dhondi*[4].

D. A. Khare, for the respondent, was not called on.

CHANDAVARKAR, J.:—The lands in dispute were Deshgat Inam held by plaintiffs' ancestors as Desais for service. Those ancestors mortgaged the Inam lands to the grandfather of defendant No. 3, with possession. Thereafter, that is, in 1856, the Inam lands were made *Khalsa, i. e.*, declared forfeited by an order of Government communicated by the Mamlatdar (see Exhibit 114) to the mortgagee who was in possession under the usufructuary mortgage. The mortgagee, however, after the forfeiture continued in possession and went on paying assessment in respect of the lands to Government. The plaintiffs, as mortgagors, brought the suit, which has led to this appeal, to redeem, and the action was resisted by the defendant upon the ground mainly that the order of forfeiture in 1856 deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant by reason of the fact that he (the defendant) was allowed by the Collector to continue in possession and pay the assessment

Now, the question is whether the order of forfeiture in Exhibit 114 had the legal effect of depriving the plaintiffs, who were then Desais, of all right and title to the lands, and of extinguishing the relation of mortgagor and mortgagee which had existed between the plaintiffs and the defendant. It has been

(1) (1891) 16 Bom. 131.
(2) (1895) 20 Bom. 747
(3) (1900) 24 Bom. 482.
(4) (1906) 30 Bom. 466.

1912.

Durrasappa v. Rango Venkatesh.

held by this Court in *Vishnoo Trimbuck* v. *Tatia*[1] and *Gangabai* v. *Kalapa Dari Mukrya*[2] that when an Inam land is resumed, the resumption has merely the effect of converting the land from a service tenure into land liable to pay assessment to Government. In *Vishnoo Trimbuck* v. *Tatia*[1], it was said by Sausse, C. J. :—

"The estate, then, which an Inamdar, in occupation by himself or his creditors, has in the lands, is a right to hold them exempt from payment of land revenue during the period or upon the conditions mentioned in the grant; and upon failure of either, a right to hold the lands to him and to his heirs so long as he or they shall pay the land revenue. This latter right is in the nature of a lease forever rendering rent, and is clearly a valuable interest, which can be made the subject of mortgage or sale by the party in possession."

Then in *Gangabai* v. *Kalapa Dari Mukrya*[2], it was said :—

"When an Inam is resumed, the Inamdar's right to exemption from the payment of the Government assessment ceases. He thereafter becomes liable to pay such assessment; but all his other rights remain unaffected."

Therefore, defendant No. 3 who came into possession of this property as mortgagee of the plaintiffs, the original Desais, could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun. That title remained unaffected by the resumption of the Inam.

On these grounds the decree of the lower appellate Court must be confirmed with costs.

Decree confirmed.

R. R.

(1) (1863) 1 Bom. H C R. 22. (2) (1885) 9 Bom. 419.

extinguished

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.
February 26.

SAVALPURI GURU BALPURI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. BALA VALAD YADAOSHET SONAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2†—Agriculturist—Definition—Gosavis—Earning livelihood by mendicancy and also from agriculture.

The plaintiffs who were Gosavis had no lands of their own at the date of the suit, but purchased some thereafter They were following two occupations, one that of Gosavis, and the other that of agriculture On a claim made by them to be agriculturists within the meaning of the term as defined in the Dekkhan Agriculturists' Relief Act, 1879,

Held, that the plaintiffs were not agriculturists, for they adduced no proof to bring themselves under the first part of the definition, and they could not take advantage of the second branch inasmuch as they being Gosavis, the presumption would be that their ordinary occupation was that of mendicancy

SECOND appeal from the decision of B C. Kennedy, District Judge of Nasik, modifying the decree passed by B. B. Kunte, Joint Subordinate Judge at Pimpalgaon.

Suit to redeem a mortgage

In 1872, an ancestor of the plaintiffs, who were Gosavis, (*i.e*, religious mendicants) mortgaged to the defendants half of a Survey No (135) They sued to redeem the mortgage in 1908. As regards the other half of the survey number the plaintiffs contended on the one hand that it was later on given by them to defendants as additional security; the defendants on the other hand denying the fact. They further contended that they had purchased the whole number at a Court-sale in 1876: and that the plaintiffs were not agriculturists.

---

* Second Appeal No 181 of 1911

† The term "agriculture" is thus defined :—

"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits

1912.

SAVALPURI v. BALA VALAD YADAOSHET.

The plaintiffs had no lands of their own at the date of the suit; but they purchased thereafter some lands. They, therefore, claimed to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act, 1879.

The Subordinate Judge held that the plaintiffs were agriculturists, for though they owned no lands at the date of the suit they must be presumed to be cultivating the lands of others as they and their fathers were professional agriculturists. He further held that the sale relied upon by the defendants was not proved; that the plaintiffs were entitled to redeem half of the survey number and as the mortgage-debt was satisfied out of the profits, the plaintiffs were entitled to be placed in possession of the property. and that the defendants were entitled to retain the other half which was not mortgaged to them by the plaintiffs.

On appeal, the District Judge held that the plaintiffs were not agriculturists; that they were entitled to redeem the mortgage; and that they were liable to pay the mortgage-debt of Rs. 100.

The plaintiffs appealed to the High Court.

A. G. Desai, for the appellants.—The definition of the term "agriculturist" in section 2 of the Dekkhan Agriculturists' Relief Act, 1879, is very general. A person may acquire or lose the status of agriculturist at any time before the date of the decree. See *Padgaya Somshetti* v. *Baji Babaji*[1]; and *Shamlal* v. *Hirachand*[2].

V. G. Ajinkya, for the respondents.—The change of status during the course of the suit does not avail the plaintiffs. The plaintiffs are religious mendicants: they have never cultivated the lands of others or worked as labourers at any time; nor have they maintained themselves wholly or principally on agriculture.

CHANDAVARKAR, J.—The Subordinate Judge found that although the appellants had ceased to be agriculturists at the date of the suit, yet they had purchased certain lands after that date, so that at the trial they were agriculturists in accordance

(1) (1887) 11 Bom. 169. (2) (1885) 10 Bom. 367.

1919.

[illegible] v. [illegible].

with the principle laid down by this Court in the three cases which he has cited, *viz.*, *Kondi* v. *Gunda*[1], *Padgaya Ramshetti* v. *Baji Babaji*[2], and *Shamlal* v. *Hirachand*[3]. But although that fact was in favour of the appellants, still it was not decisive of the case, because the appellants ought to have proved one of two things in order to entitle them to the benefit of the provisions of the Dekkhan Agriculturists' Relief Act They were bound to prove either that they were earning their livelihood wholly or principally by agriculture carried on within the limits of the district; or that they ordinarily engaged personally in agricultural labour within those limits. The first part of this definition the appellants did not attempt to prove. It is found as a fact by the learned District Judge that these appellants are not agriculturists. They are Gosavis—religious beggars. They were following two occupations, one that of Gosavis or religious beggars, and the other that of agriculture, and therefore, the material question was whether they earned their livelihood wholly or principally by means of agriculture. On that point no proof was adduced. And it was not suggested that their case fell within the first branch of the definition of "agriculturist" in the Act. Nor can they take advantage of the second branch of the definition, there being [illegible] by them. The question was, which was the occupation which they ordinarily followed They are Gosavis and the presumption in such a case would be that their ordinary occupation was that of mendicancy. On that ground the decree must be confirmed with costs.

Decree confirmed.

R. R.

(1) (1882) P. J. 156.

(3) (1885) 10 Bom. [illegible]

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. February 26.

DHONDI WALAD MAHIPATI (ORIGINAL DEFENDANT NO 1), APPELLANT, v. RADHABAI MARD SHAHAJI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Inheritance—Paternal grand-mother—Estate taken by her is limited estate—Women entering family by marriage take limited estate.

Under Hindu Law the paternal grandmother, inheriting to her grandson, takes a limited estate for life

All the women who belong to a family by marriage, not by birth, take a limited estate in the property which they inherit from any male member of that family

SECOND appeal from the decision of Vajeram Maniram, First Class Subordinate Judge, with Appellate Powers at Nasik, confirming the decree passed by N V. Desai, Subordinate Judge at Malegaon.

The property in dispute belonged originally to one Kedari, who had a younger brother Malhari. Mahipati had two sons: Dhondi (defendant No. 1) and Ganu Ganu died leaving him surviving his widow Parvati (defendant No. 2) and two sons Karbhari and Kedari (defendants Nos. 3 and 4).

Kedari was married to Bhiki and had by her one son Chima and two daughters, Radhabai and Saru (plaintiffs). The property was inherited by Chima on Kedari's death; and on Chima's death, it was inherited by his son Gaba. On Gaba's death, his paternal grandmother Bhiki inherited the property. The plaintiffs, the daughters of Bhiki, claimed the property on Bhiki's death. The defendants, who were heirs of Malhari, resisted the claim contending *inter alia* that the property was held jointly by Kedari and Malhari, and that therefore they were entitled to succeed to the property.

The lower Courts held that the property in question was the separate property of Kedari and decreed the plaintiff's claim.

The defendant No. 1 appealed to the High Court.

S. S. Patkar, for the appellant (defendant No. 1).—We contend that the defendant No. 1 is entitled as *gotraja*

* Second Appeal No. 426 of 1911.

sapinda to succeed to Gaba in preference to the plaintiffs who are paternal aunts: see *Ganesh* v. *Waghu*[1]. The plaintiffs cannot derive their title as succeeding to Bhiki, the paternal grandmother of Gaba. Bhiki cannot become a fresh stock of descent, for she takes merely a life estate: see *Tuljaram Morarji* v. *Mathuradas*[2]. There is no express case on the point. But it is decided that a mother takes a limited estate in inheriting to her son: *Vrijbhukandas* v. *Bai Parvati*[3]. Further in *Bhau* v. *Raghunath*[4], it is laid down that in this presidency female heirs, except those who come into the family of the propositus by marriage, take absolute interests. This rule must govern the case of the grandmother on the principle *stare decisis*.

P. B. Shingne, for the respondents.—We say that the grandmother takes an absolute estate. She comes in as heir in her own right: see *Gandhi Maganlal* v. *Bai Jadab*[5]. The cases relied on by the other side are cases of mother.

CHANDAVARKAR, J.—The lower Courts have found that Gaba was a divided member of the family of Kedari and Mahipati, originally joint. When Gaba died, Bhiki as his grandmother and heir inherited his property with a limited estate, and, on the death of Bhiki, the appellant, being the nearest male *gotraja sapinda* of Gaba, and therefore his reversionary heir, became entitled to the property in preference to the plaintiffs, the paternal aunts of Gaba. see *Vrijbhukandas* v. *Bai Parvati*[6] and *Ganesh* v. *Waghu*[1]. We have been asked by Mr. Shingne, the learned pleader for the respondents, to hold that Bhiki took an absolute estate and that, therefore, on her death, the property in question which she had inherited from Gaba became her *stridhan*, and as such descended to the plaintiffs, her daughters. According to the settled law of this Court, the widow and the mother of a propositus, succeeding as heirs, take each but a limited estate for life. It is true that there is no

(1) (1903) 27 Bom. 610.
(2) (1881) 5 Bom. 662.
(3) (1907) 32 Bom. 26.
(4) (1905) 30 Bom. 229.
(5) (1900) 24 Bom. 192 at p. 212.
(6) (1907) 32 Bom. 26 at p. 29.

1912.

DHONDI
v.
RADHABAI.

decision of the Court which directly settles the question of the character of the estate taken by a paternal grandmother inheriting the property of her grandson. But the reason of the rule of law, which in this Presidency applies to a widow and a mother, applies equally to the grandmother and all other females, who come into the family of the propositus by marriage. The rule is that all women, who belong to a family by marriage, not by birth, take a limited estate in the property which they inherit from any male member of that family. It is too late in the day to ask us to upset the rule and we must now apply the principle of *stare decisis*. The decree must, therefore, be reversed, and the plaintiffs' suit dismissed with costs of this appeal upon the respondents. There will be no order as to the costs in the two Courts below.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.
March 1.

VITHAL RAMCHANDRA DESHKULKARNI (ORIGINAL DEFENDANT), APPELLANT, v. SITABAI BHRATAR SITARAM MORESHVAR VAIDYA (ORIGINAL PLAINTIFF), RESPONDENT *

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Suit to recover interest on mortgage money—Award of interest on a certain principal sum—Suit for foreclosure—Finding as to principal amount in the first is not res judicata *in the second suit—Dekkhan Agriculturists' Relief Act (XVII of 1879).*

In a suit brought by a mortgagee to recover interest on his mortgage money, the amount was found to be Rs. 250 and interest was awarded on that sum. The mortgagee subsequently brought another suit to foreclose the mortgage, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879; the mortgage amount was found to be Rs. 400 and relief was accordingly granted. It was contended in appeal that the finding as to the mortgage amount in the first suit operated *as res judicata* in the second suit:—

Held, that the Dekkhan Agriculturists' Relief Act, 1879, was in relief of a certain class of His Majesty's subjects, and, therefore, the finding in the first suit could

* Second Appeal No. 161 of 1911.

not affect and be *res judicata* in the second suit, which was of a different character given to it by a special law unless the previous suit also could fall within the class of suits to which that law applied.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Ratnagiri, amending the decree passed by P. S. Pathak, First Class Subordinate Judge at Ratnagiri.

Suit to foreclose a mortgage.

The facts were that the defendant executed a mortgage in favour of the plaintiff in 1903, for Rs 400. In 1906, the plaintiff brought a suit against the defendant to recover from him interest on the mortgage amount for two years. In that suit the principal amount was taken to be Rs 400, and interest was awarded on that amount In 1909, the plaintiff brought another suit to foreclose the mortgage, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879.

The Subordinate Judge found that the mortgage amount was Rs. 350 and made the sum together with interest recoverable in instalments from the defendant.

On appeal, the District Judge varied the decree by holding that the mortgage amount was Rs. 400.

The defendant appealed to the High Court.

P. D. Bhide, for the appellant

N. V. Gokhale, for the respondent.

CHANDAVARKAR, J .—We must confirm the decree with costs. The objection raised to the admission, by the Court of appeal, of the receipt, Exhibit 9 in appeal, is clearly unsustainable, because the record shows that that document had been produced in the Court of first instance, that its genuineness was admitted by the present appellant, but that the Court for some reason or other omitted to make it a part of the evidence The lower appellate Court, therefore, was right in admitting it in evidence formally. It is urged, however, that the lower appellate Court's finding that the principal sum advanced was Rs. 400 and not Rs. 350 is bad in law because the question as to the amount of the principal is *res judicata* by reason of a finding in a previous suit. That previous suit was, however, one

1912.

VITHAL RAMCHANDRA v. SITABAI.

which had been brought by the mortgagee for interest due on the principal amount for certain years. The present suit is brought on the mortgage contract, and the plaintiff prays for relief by way of sale of the mortgaged property. Being therefore a suit for sale, it falls within section 3, clause (y); and section 12 of the Dekkhan Agriculturists' Relief Act directs the Court in such a suit to go into the history of the transaction between the parties from the date of the transaction, notwithstanding any admission that may have been made by either party. The Act is in relief of a certain class of His Majesty's subjects, and therefore, the finding in the previous suit could not affect and be *res judicata* in the present suit, which is of a different character given to it by a special law, unless the previous suit also could fall within the class of suits to which that law applies.

For these reasons the decree must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor.

1912. *March* 15.

MAHADEV LAXMAN WAGLE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. GOVIND PARASHRAM WAGLE, DECEASED, BY HIS HEIRS AND DAUGHTERS SAKHUBAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Suit for partition—Decree awarding shares—Appeal—Death of a sharer leaving daughters—Decree for partition final—Severance effected by the decree can be displaced only by a legal decree in appeal.

In a suit for partition the first Court passed a decree awarding to the sharers their respective shares. While an appeal against the decree was pending, one of the sharers died leaving two daughters. Thereupon a question having arisen as to whether the shares of the surviving sharers were liable to be increased owing to the death of the sharer pending the appeal,

* Second Appeal No. 228 of 1910

Held that the pendency of the undecided appeal did not detract anything from the vitality or the force of the existing decree. Although the decree was under appeal, it was not the less a final decree of a competent Court. The decree, once made, there and then determined the legal status or relation of the parties and the severance of interest so effected by the decree at the moment it was pronounced could be displaced only by a legal decision in appeal.

Sakharam Mahadev Dange v. *Hari Krishna Dange*[1], explained.

SECOND appeal from the decision of S. S Wagle, First Class Subordinate Judge of Thana, with appellate powers, amending the decree passed by N. G Chapekar, Subordinate Judge of Roha.

This action was instituted by the plaintiff to obtain by partition a third share in the property in suit He alleged that the property belonged to the joint family consisting of himself, his brother, defendant 1, and his nephews, defendants 2—5, the sons of his deceased brother.

The defendants answered that the plaintiff being a lunatic was not entitled to a share but only to maintenance, that the property was not joint family property but the separate and self-acquired property of the defendants and that the claim was time-barred

The Subordinate Judge found that the plaintiff was not a lunatic, that a part of the property in suit belonged to the joint family and the rest was acquired by the defendants and that the plaintiff's claim for partition of the joint family property was not barred by the defendants' adverse possession. He, therefore, passed a decree giving to the plaintiff a third share in the property found to be joint

Both the parties appealed and while the appeals were pending the plaintiff died leaving him surviving two daughters, who were brought on the record as his legal representatives The defendants objected to the deceased being represented by his two daughters on the grounds that (1) the plaintiff having died a member of a joint Hindu family, the right to appeal did not survive and the appeal abated, and (2) the plaintiff's interest in the joint family property devolved, on his death,

(1) (1881) 6 Bom. 113.

1912.

MAHADEV LAXMAN v. GOVIND PARASHRAM.

on the defendants by right of survivorship, therefore, the daughters had no right to continue the appeal. In support of their contention the defendants relied upon *Babaji Parshram* v. *Kashibai*[1], *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[2], *Ahmadji* v *Mahamadji*[3], and *Rajnarain Singh* v. *Heeralal*[4]. But the appellate Court overruled the defendants' contention having regard to *Lakshman* v. *Narayan*[5], *Bhaurao* v. *Radhabai*[6], *Krishna Panda* v *Balaram Panda*[7], *Subbaraya Chetti* v. *Sadasiva Chetti*[8], and Mayne's Hindu Law, 7th Ed., p. 672. On the merits the appellate Court found that the plaintiff and the defendants were not divided in interest, that the whole property in suit was joint and no part of it was the separate or self-acquired property of the defendants, that the defendants had not held the property adversely to the plaintiff for more than twelve years and that the plaintiff was entitled to a third share in the whole immoveable property in suit. The appellate Court, therefore, in the appeal filed by the plaintiff, amended the decree of the first Court by directing that the plaintiff was entitled to obtain by partition a third share in all the immoveable properties set out in the plaint. The appeal presented by the defendants was dismissed with costs.

The defendants preferred a second appeal

S. S. Patkar, for the appellants (defendants) :—The first question is whether so long as a decree is under appeal, it effects a severance The ruling in *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[9] is an authority for the proposition that it does not effect a severance. The cases relied on by the lower Court do not relate to decrees which are under appeal. The ruling in *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[9] is followed in *Ahmadji* v. *Mahamadji*[10]. The decision in *Rustomji* v *Sheth Purshotamdas*[11] is an authority

(1) (1879) 4 Bom. 157.
(2) (1881) 6 Bom. 113.
(3) (1899) 1 Bom. L. R. 219.
(4) (1876) 5 Cal. 142.
(5) (1899) 24 Bom. 182 at p. 187.
(6) (1909) 33 Bom. 401.
(7) (1896) 19 Mad. 290.
(8) (1897) 20 Mad. 190.
(9) (1881) 6 Bom. 113.
(10) (1899) 1 Bom. L. R. 219.
(11) (1901) 25 Bom. 606 at pp. 613, 614.

for the proposition that it is open to the Court to vary a decree under appeal not only for errors but also on grounds which have come into existence since it was passed. We submit that if a share in a joint family property can be increased or decreased in appeal according to the happening of events after the decree of the lower Court, such share for like reasons can be extinguished. In the present case on the death of the plaintiff, his share devolved by survivorship on the defendants, and plaintiff's daughters have no right to continue the appeal. The second point is with regard to property marked C which was purchased by defendant 1 in his own name in 1888 The lower Court was wrong in throwing the burden of proof upon us, having regard to the decision in *Vinayak Narsinvh* v *Datto Govind*[1].

N. A. Shiveshvarkar, for the respondents (heirs of the deceased plaintiff) :—We rely on Golapchandra Sarkar's Hindu Law, Edition of 1910, p 235, Edition of 1911, p. 260. The decree effects a severance Stoke's Hindu Law Books, p. 47; Ghose's Hindu Law, p 476 (2nd Edn.), *Joy Narain Giri* v. *Girish Chunder Myti*[2], *Chidambaram Chettiar* v. *Gauri Nachiar*[3]. The intention to divide is tantamount to partition. The decision in *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[4] can be distinguished on the ground that the share there was increased in appeal The ruling in *Vinayak Narsinvh* v *Datto Govind*[1] is not applicable because there was a previous partition.

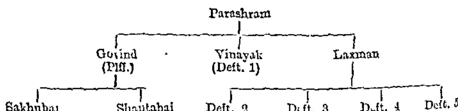
Patkar, in reply :—A decree for partition does effect severance. The question is whether a decree for partition, so long as it is under appeal, does or does not effect severance and whether an appellate Court cannot vary the decree and hold that the plaintiff's right went by survivorship to the defendants owing to his death having occurred after the decree.

BATCHELOR, J. :—The relation of the parties concerned in this appeal is shown in the following genealogical tree :—

(1) (1900) 25 Bom. 367.
(2) (1878) 4 Cal. 434.
(3) (1879) 2 Mad. 83.
(4) (1881) 6 Bom. 113.

1912.

MAHADEV LAXMAN v. GOVIND PARASHRAM.



Plaintiff sued for partition alleging that he was entitled to a one-third share, and that the plaintiff and defendant 1 and Laxman were in union. Various defences were raised, including the defence that the property in suit was not joint property but had been separately acquired.

The Subordinate Judge in the Court of trial gave the plaintiff a one-third share in a certain portion of the properties. On appeal the District Court has allowed the plaintiff partition in all the immoveable properties, awarding him the third share which was claimed.

The present appeal is brought by the defendants, and the first point taken on their behalf by their learned pleader arises in consequence of the accident that between the decision of the trial Court and the decision of the District Court the original plaintiff Govind died He left, as has been said, no male issue, but only two daughters, Sakhubai and Shantabai.

Mr. Patkar contends that so long as the trial Court's decree was under appeal before the District Court, that decree could not effect a severance between the plaintiff and his relatives. In support of that proposition he relies upon the decision in *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[1]. It follows, says the learned pleader, that upon the death of Govind, the defendants became entitled to the property by right of survivorship, and that the daughters of Govind never became entitled to take by inheritance. It appears to me that this argument ought not to succeed. I think it is based upon a misapprehension of certain passages occurring in Sir Michael Westropp's judgment, the misapprehension arising from the reading of particular passages in an isolated manner and without reference to the whole case which was then before the Court.

(1) (1881) 6 Bom. 113.

That was a case instituted for a partition of certain family property in the possession of the defendants, and the plaintiff claimed one-eighth share in that property. The Subordinate Judge allowed the plaintiff's claim to the one-eighth share, and that decree was affirmed by the District Judge on appeal. When the case came before the High Court in the second appeal Mr. Shamrao Vithal, who appeared for the plaintiff-respondent, read an affidavit to the effect that one of the defendants had died subsequent to the filing of the second appeal. He submitted that in consequence of this defendant's death, the plaintiff's share in the family property must be increased from one-eighth to one-sixth. Mr. Kirloskar, who was for the defendants, admitted the fact of the death of one of the defendants, but he urged that in conformity with the decision in *Joy Narain Giri* v. *Girish Chunder Myti*[1] the plaintiff's claim for a larger share than that allowed by the District Court could not be entertained

It is clear, therefore, what was the question which Sir Michael Westropp and Mr. Justice Pinhey had before them for decision The question was simply whether owing to the death of one of the defendants, subsequent to the District Court's decree, the increase in the plaintiff's share, which in Hindu Law must necessarily have followed upon the defendant's death, ought to be allowed in second appeal. The Bench answered that question in the affirmative. And if the judgment be read as a whole, it seems to me manifest that that question and that alone was prominently before the minds of the Judges. It is quite true that in one part of the judgment Sir Michael Westropp says — "We cannot hold that the Subordinate Judge's decree operated as a severance so long as it remained under appeal." And if this passage could be detached from its context, I agree that it would furnish plausibility to Mr. Patkar's argument. When, however, it is read in its context, and with reference to the particular question which alone occupied the minds of the Judges, I do not think that the sentence affords any assistance to the appellants' argument. All that was decided there was that where a

(1) (1878) 4 Cal. 434.

1912.

MAHADEV LAXMAN v. GOVIND PARASHRAM.

plaintiff's share in family property has under Hindu Law been increased owing to the death of a defendant after the District Court's decree it is open to the High Court to take notice of that death, and the consequent devolution of the larger share. That is what was decided in *Sakharam Mahadeo Dange* v. *Hari Krishna Dange*[1]. What is it that I am asked to decide in this case? It is that owing to the death of Govind, after the decision of the First Court, that decision must be set aside. In my opinion, however, the mere pendency of an undecided appeal does not detract anything from the vitality or the force of an existing decree. And although the decree now in question was under appeal, I am of opinion, that it was not the less a final decree of a competent Court. The decree once made did, I think, there and then determine the legal status or relation of the parties, and the severance of interests so effected by the decree at the moment it was pronounced could be displaced, it seems to me, only by a legal decision in appeal

Mr. Patkar has urged that if a share in joint family property can be increased or decreased according to the happening of events after the District Court's decree, such share can for like reasons be extinguished. But I cannot concede that. To increase or decrease a plaintiff's share in consequence of events subsequent to the District Court's decree may be regarded merely as a means of bringing that decree into conformity with existing facts, in other words as a means of affirming that decree. It would be a totally different thing to upset that decree, not for any legal reason, but on account of a supervening fact which so long as the decree stands is of no consequence.

For these reasons I am of opinion that there is nothing in this appeal which justifies the present argument on behalf of the appellants.

The only other point taken by Mr Patkar was with reference to the property falling in the sub-division marked (c) in the lower appellate Court's judgment, that is to say, the

[1] (1881) 6 Bom. 113.

lands purchased in the name of Vinayak in the year 1888. Mr. Patkar complains that the learned Judge was wrong in throwing the burden of proof upon his clients. And he quotes in support of his argument the decision in *Vinayak Narsinvh* v. *Datto Govind*(1). That case, however, was decided on very different facts from those which are now before us. What we have here is that the learned Judge below having regard to all the evidence including the fact that there was a substantial nucleus of joint family property, found that this particular property had been purchased for the coparcenary. That, I think, is not a finding which can be successfully challenged now in second appeal.

No other point was taken, and for these reasons I dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1900) 25 Bom 367

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

S. R. B. MOTILAL CHUNILAL (ORIGINAL OPPONENT), APPELLANT, v. THAKORLAL CHIMANLAL AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

1912. *March* [illegible]

Indian Companies' Act (VI of 1882), sections 28, 45, 61—Indian Contract Act (IX of 1872), sections 2 (a), (b), 3, 10—Company—Shareholder—Inducement by the agent of the Company to take shares—Winding up—Recovery of calls on shares—Agreement that shares were not to be paid unless dividend was given—Agreement not registered—Payment of shares in cash—Condition precedent—Condition subsequent—"Bogus" shareholder.

The question as to whether a particular person became a member of a Company is a question of fact

Where the Agent of a Company induces a person to sign an application for the shares of the Company and that person's name is accordingly entered in the register of members as a shareholder, there is a complete contract between that person and the Company's agent under sections 2 (a), (b), 3 and 10 of the Indian Contract Act (IX of 1872).

* First Appeal No 101 of 1911.

1912.

MOTILAL CHUNILAL v. THAKORLAL CHIMANLAL.

No contract by which shares are to be considered as duly paid when they are not in fact paid up is valid unless it is registered and when there is no such registered contract the shares are payable in cash.

Where in the event of a Company not making a profit the shares were not to be paid for at all, the shareholder was a "bogus" shareholder, and this is opposed to the whole object of the Companies' Acts in England and in India.

Calls made in the winding up being calls for something unpaid on the shares are not a debt due to the Company but are contributions due by a member under section 61 of the Indian Companies' Act (VI of 1882) and he is liable to pay them. The contribution under the section also applies to unpaid calls made before the winding up; because although that is a debt due to the Company it is not the less "an amount unpaid" on the shares with respect to which the member liable.

When the Manager of a Company forwards to an applicant notice that he is entitled to shares in the Company accompanied by a form of application for shares and the applicant signs the form of application and returns it to the Manager, the applicant becomes liable as a shareholder, notice of allotment being immaterial

FIRST appeal against the decision of M. B. Tyabji, District Judge of Broach, in application No. 1 of 1910, under the Indian Companies' Act (VI of 1882).

The Narmada Cotton Seed Crushing Company, Limited, being wound up, the Liquidators began to collect the money due on account of the calls of the shares of the Company, and they applied to the District Court of Broach for the recovery of calls on ten shares due by Sardar Rao Bahadur Motilal Chunilal, who denied liability alleging that he was induced to take the ten shares by one Girdharlal, the agent of the Company since deceased, by telling him that he was not to pay for the shares unless dividend was paid, and that he, accordingly applied for the shares but no notice of allotment was given to him.

The District Judge over-ruled Motilal's contention and directed him to pay the amount of the calls due by him on account of the shares for the following reasons :—

It is evident from Mr. Motilal's evidence that there was a private understanding between him and the agent that Mr. Motilal should be entered as a shareholder, that the circumstance that he was (only nominally as a matter of fact) a shareholder should be made use of to induce others to invest money in the Mill, while Mr. Motilal himself was not to pay what was due from him on the shares, unless and until the Mill became a profitable concern.

This agreement appears to me decidedly opposed to the public interests, and therefore of a kind which the Courts cannot countenance. On this ground I over-rule the objection.

Mr. Motilal took the shares subject to the conditions and terms embodied in the Memorandum of Association. Clause 144 of this is to this effect:—"On the trial or hearing of any action or suit to be brought by the Company, against any shareholder or his representatives, to recover any debt or money claimed to be due to the Company in respect of his shares, it shall be sufficient to prove that the name of the defendant is, or was, when the claim arose, on the register of the shareholders of the Company as a holder of the number of shares in respect of which such claim is made, and that the amount claimed is not entered as paid in the books of the Company."

These conditions are satisfied. The applicant never wrote to the agents cancelling the application for shares. The Liquidators' claim against him is therefore a good one and I direct the amount in question to be paid with costs.

Motilal Chunilal appealed.

Govindlal N. Thakore, for the appellant (opponent):—Though we made an application for ten shares, we were induced to do so by the agent of the Company and no notice of the allotment of shares was given to us. The following elements must be present to saddle a man with liability as a shareholder:—

(1) Application for shares,

(2) Allotment of shares, and

(3) Notice of allotment

The contract for the shares was a conditional contract. There was *condition precedent* and unless that condition, namely, the payment of dividend, is satisfied we are not liable. If the condition was illegal the whole contract must fall through.

The following cases were cited during argument:—

Gunn's case[1], *Tothill's case*[2], *Ward's case*[3], *Reidpath's case*[4], *Shackleford's case*[5], *Ex parte Fletcher*[6].

D. A. Khare, for the respondents (applicants):—As soon as the appellant applied for shares, the contract became complete

(1) (1867) L. R. 3 Ch. 40.
(2) (1865) L. R. 1 Ch. 85.
(3) (1870) L. R. 10 Eq. 659.
(4) (1870) L. R. 11 Eq. 86.
(5) (1866) L. R. 1 Ch. 567.
(6) (1867) 37 L. J. Ch. 49.

1912

MOTILAL CHUNILAL v. THAKORLAL CHIMANLAL.

and it was not necessary to give notice of allotment; *Brown and Tucker's cases*[1].

The condition precedent relied on is opposed to law and cannot be enforced.

RUSSELL, J.—This suit was brought by the Liquidator of the Narmada Cotton Seed Crushing Company, Limited, against the defendant Motilal Chunilal to recover calls upon ten shares in that Company of Rs. 100 each The first question that arises is · Is the defendant a member of the Company? By section 45 of the Indian Companies' Act members are (*a*) *subscribers of the Memorandum of Association*, (*b*) *every* other person who has agreed with a Company under this Act to become a member of such Company, and whose name is entered on the register of members The defendant's name was entered on the register of members, so this condition precedent has been complied with see *Tufnell & Ponsonby's case*[2]. Did he agree to become a member? That is a question of fact: Fry, J, in *Winstone's case*[3] The evidence of the defendant is to this effect. He knew Girdharlal Pleader who was the agent of the Company and who asked defendant to take ten shares in it, and the defendant signed the application for them, (the application is an Exhibit herein). Defendant said he was doubtful whether the Company's business would be profitable. Girdharlal said he need not pay for the shares unless dividend was paid Defendant was told that if he and others like him became shareholders the Company's shares would be taken up. Defendant would not have signed the application but for the condition He never paid anything in respect of the shares, nor was any demand made upon him, nor was he informed that the ten shares had been allotted to him In cross-examination he said he was President of the Agricultural and Industrial Association of Broach, and had been trying to manage industries in Broach. Girdharlal desired to increase the reputation of his Mill and to take

(1) (1871) 25 L. T. N S. 654 (2) (1885) 29 Ch. D. 421.
(3) (1879) 12 Ch. D. 239 at p. 246.

money from the defendant if there was profit. If he had received intimation of the allotment he would have filed it.

Girdharlal is dead, so the matter must be decided on this evidence.

Although a witness in the case K. Narbheram at page 11 says that there was an allotment of shares, the resolution for which was passed on 9th April 1908, and accordingly letters allotting shares were sent, still, we must adopt the finding of the Judge in the lower Court that the defendant received no notice that the shares had been allotted to him The ordinary principles laid down in the Contract Act must apply to the case. And in our opinion when according to the defendant's statement "Girdharlal asked him to take ten shares in the Company and he signed the application for them" the proposal came from the Company's Agent and was accepted by the defendant. If this view is correct then there was a complete contract between the defendant and the Company's agent (see section 2 (*a*) and (*b*), Indian Contract Act, and sections 3 and 10). In *Nicol's case*[1] it was held that the agreement was not different from agreements in relation to other matters. No particular form is required . see *Ritso's case*[2]. And it may be expressed or implied and either written or oral : see *Bloxam's case*[3]

It was suggested by Mr. Thakore in reply for the defendant that Girdharlal was not the Agent of the Company to make such a proposal. But the fact that the defendant was registered as a shareholder is evidence of ratification by the Company of Girdharlal's action in making the proposal to the defendant. And we have no doubt that in trying to get shareholders to subscribe he was acting within his authority as agent. Our view of the defendant's evidence is that he intended to become a member of the Company and knew that his name would be entered on the register and would be used as an inducement to other persons to become members but that he was not to be called upon to pay the money due in respect

(1) (1885) 29 Ch. D. 421. (2) (1877) 4 Ch. D. 774.
(3) (1864) 33 Beav. 529.

1912.

MOTILAL CHUNILAL v. HARORLAL HIMANLAL.

of the ten shares unless and until the Mill made a profit. No doubt where an application for shares is subject to a *condition precedent* that condition must be performed to create a liability to take them. But where the application is subject to a *condition subsequent the liability arises* although the condition is never complied with: see Halsbury's Laws of England, Title "Companies", page 145, and the cases there cited.

Here we find there was a complete and binding agreement on the defendant's part to become a member although there may have been a condition subsequent as to the payment for the shares. Now it appears to us that such a condition subsequent is in direct violation of section 28 of the Indian Companies' Act which is as follows:—

"Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

In Re British Farmers Pure Linseed Cake Company[1], Jessel, M. R., held the meaning of the section to be that "you are prohibited from contracting that shares issued shall be paid for otherwise than in cash except by a registered contract." And Lord Blackburn in *Burkinshaw* v *Nicolls*[2] said that the 25th section of the English Act means no more than this: "that no contract by which shares shall be considered as duly paid up when they are not in fact paid up, shall be valid unless it be registered; and that when there is no such registered contract, the shares are to be payable in cash." In the present case in the event of the Company not making a profit the shares were not (according to the defendant's evidence) to be paid for at all. In other words in that event the defendant was to be a "bogus" shareholder. This, we do not hesitate to say, is opposed to the whole object of the Companies' Acts in England and in India

Under these circumstances the defendant, under section 61 of the Indian Companies' Act, is liable for the amount claimed. For "calls made in the winding up, they being calls for some-

(1) (1878) 7 Ch. D. 533 at p. 535. (2) (1878) 3 App. Cas. 1004 at p. 1025.

thing unpaid on the shares, that is a contribution due by the member under the Act, and is not a debt due to the Company. The contribution also under this section applies to the unpaid calls made before the winding up; because, though that is a debt due to the Company, it is not the less an amount unpaid (see clause (*d*) of the section) on the shares in respect of which he is liable": Jessel, M. R, *In re Whitehouse & Co.*[1]

Mr. Thakore for the appellant relied on several cases. In *Gunn's case*[2], Gunn applied for the shares and did not, as we have held defendant here did, accept them. And the same in *Tothill's case*[3], where no allotment was made

In *Ward's case*[4] also it was an application by Ward for two hundred shares in respect of which no allotment was made. *Reidpath's case*[5] does not touch the present one, because there it was held that mere posting of a letter of allotment is no communication to the applicant In *Shackleford's case*[6] the application was sent in by Shackleford in answer to which there was no allotment, held, there was no concluded contract by him to take the shares So also *Ex parte Fletcher*[7] does not apply Looking at what we have said about the facts in this case, these cases, in our opinion, do not apply to the present.

On the other hand the present case, it appears to us, falls within *Brown and Tucker's cases*[8], relied upon by Mr D. A. Khare for the plaintiffs, where it was held that where the Manager of the Company forwarded to Thucker notice that he was entitled to shares in the Company accompanied by a form of application for shares, and Thucker signed the form of application and returned it to the Manager, that Thucker was liable as a shareholder, notice of allotment being immaterial.

Under these circumstances, the decision of the learned Judge in the Court below is correct and we dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1878) 9 Ch D 595 at p 600
(2) (1867) L R. 3 Ch. 40.
(3) (1865) L R 1 Ch 85
(4) (1870) L. R. 10 Eq 659
(5) (1870) L. R. 11 Eq 86.
(6) (1866) L R. 1 Ch 567.
(7) (1867) 37 L. J. Ch. 49
(8) (1871) 25 L. T. N. S. 654

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911.
August 22

RAJA BAHADUR SHIVLAL MOTILAL *v.* THE TRICUMDAS MILLS COMPANY, LIMITED.*

Internal defects in management of a limited company—Innocent party not affected thereby—Principal and agent—Fraud of agent in withholding information from principal—Principal not affected by notice to agent in such case—Absolute undertaking to execute a mortgage on specified property on the happening of a particular contingency—Effect of such undertaking as giving a charge over the property on the occurrence of the contingency

By a mortgage of the 15th April 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he appointed one Dani, his munim in Bombay, as such nominee

In June 1907 the defendants borrowed three lacs on a cash credit opened with the Bank of India for one year from June 11th, 1907 The said transaction was made conditionally on the defendants giving an undertaking not to further charge the property previously mortgaged to the plaintiff and a resolution to that effect was passed at a meeting of the defendants' directors at which Dani was present. No letter of undertaking was in fact given

The loan from the Bank of India was renewed at the end of the year for another year. The Bank made some attempt to obtain a higher rate of interest, but in the end the loan was renewed at the same rate as before

In 1909 the defendants failed to pay the said loan to the Bank of India when due. Finally the said loan was renewed for three months on further security being given on June 30th, 1909

On August 5th, 1909, the defendants applied to the plaintiff for a further advance of five lacs of which two lacs were required urgently on the security of the said property mortgaged to the plaintiff The plaintiff consulted Dani who approved of the transaction. The plaintiff thereon advanced two lacs and received a receipt for the sum in which it was stated that the said two lacs formed part of a sum of five lacs intended to be advanced by the plaintiff, that the plaintiff should have time to consider whether he would advance the said sum of five lacs as a further charge and that in the event of the plaintiff deciding to advance such sum the defendants would execute a proper legal deed of charge to secure such sum and interest and in the event of the plaintiff deciding not to make such further advance the said sum of two lacs should be repaid immediately with interest and together with the original loan of six lacs At the date of the said receipt there were only three directors of the defendants and not four, the minimum number under the Articles of Association of the defendants.

* Suit No. 857 of 1910.

Thereafter the plaintiff decided to make the proposed advance and signified his intention to the defendants.

A formal deed of charge was prepared but not executed owing to the insolvency of the defendants and other circumstances

On August 10th the plaintiff for the first time received notice of the resolution of the defendants in favour of the Bank of India

The plaintiff had the receipt passed in his favour by the defendants stamped as a charge on land and registered.

On September 17th the defendants were declared insolvent and Mr R. D. Sethna was appointed liquidator As such liquidator he was ordered to sell the mortgaged property and hold the sale-proceeds subject to the amount due to the plaintiff

The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale-proceeds for two lacs and interest and for payment of that sum

Held, that there was no properly constituted Board of Directors of the defendants at the date of the said receipt, but held that the resolution of the defendants' directors in favour of the Bank of India was exhausted after one year and was not renewed on the renewal of the loan by the Bank of India

Held further, that Dani had withheld information from the plaintiff as to the said resolution in favour of the Bank of India fraudulently and that the plaintiff could not be imputed to have received notice of that resolution, that in any case the defendants would not be allowed to take advantage of their breach of resolution and that the plaintiff's rights were in no way prejudiced by irregularities in the internal management of the defendants, such as the absence of a Board at the date of the receipt in favour of the plaintiff, of which the plaintiff had no notice.

Held further, that the receipt given by the defendants to the plaintiff amounted to an unconditional undertaking to execute a deed of further charge in favour of the plaintiff on the happening of a future event, namely, on the plaintiff tendering the sum of three lacs, the balance of the proposed loan of five lacs, on the property specified therein, for the whole amount of five lacs, of which the two lacs already advanced was a part, and that the said receipt consequently gave the plaintiff a valid charge over the defendants' property for the two lacs advanced and interest.

BY a mortgage of the 15th of April 1905 the defendants mortgaged to the plaintiff their immoveable property and machinery for six lacs The loan was for a period of six years, and one condition was that the plaintiff or his nominee should be a director of the defendants during its continuance.

The plaintiff appointed his *munim* in Bombay, one Dani, as his nominee on the defendants' Board.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

Afterwards, while Dani was still a director of the defendants, the defendants, being in need of money, negotiated for a loan in the form of a cash credit of three lacs with the Bank of India. That Bank refused to advance that sum except on the condition that the defendants should undertake not to further charge or mortgage the mill property during the currency of the loan. Dani was a director of the Bank of India and was present at the meeting of the Bank's Board held on the 7th of June 1907, at which a resolution to that effect was passed, and Dani was also present at a meeting of the defendants' Board held on the 11th of June 1907, at which a resolution was passed authorising the giving of an undertaking to substantially that effect. The Bank accordingly advanced three lacs to the defendants for one year from the 11th of June 1907 and the defendants passed a promissory note to the Bank for that amount.

For some reason, however, no letter undertaking not to charge the defendants' property was ever given to the Bank of India

The said loan by the Bank of India was renewed by a resolution of the Bank's Board of the 3rd of June 1908 for a further period of one year up to the 11th of June 1909. Some suggestion was made that a higher rate of interest should be charged on renewal, but the loan was eventually renewed at the same rate.

The defendants failed to pay the said loan to the Bank of India and ultimately the loan was renewed by a resolution of the Bank's Board on the 30th of June 1909 on the same terms as before for three months on condition that the Bank should be given a full legal lien on all stock of the defendants

In the beginning of June 1909 there were six directors of the defendants, including Dani On the 12th of July 1909 Dani resigned. Two of the other directors had previously resigned and there were thus left three directors or an insufficient number to form a Board under the defendants' Articles of Association (four being the prescribed number).

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED

on execution of the deed of further charge and on the terms and conditions mentioned in the said receipt.

A formal deed of further charge was then prepared by the plaintiff's solicitors, but before its execution events occurred which prevented the matter being proceeded with and the defendants became insolvent.

On the 10th of August 1909 the plaintiff was informed for the first time by a letter from the Manager of the Bank of India of the cash credit of the defendants with the Bank and of the undertaking given in respect of it.

The receipt given to the plaintiff was at first stamped with a one-anna stamp but afterwards the plaintiff took steps to have the document stamped and registered as a charge on land and the document was registered on the 10th of September 1909, a sufficient identification of the mill property being filled in by Dani for the purposes of registration.

On the 17th of September 1909 the defendants were adjudicated insolvent and Mr. R. D. Sethna was appointed liquidator thereof.

By an order of the Chamber Judge made in the liquidation of the defendants it was ordered that the liquidator should sell the properties mortgaged to the plaintiff and hold the sale-proceeds subject to the amount due to the plaintiff.

On the 23rd of December 1909 the liquidator sold the said properties for the sum of Rs 15,25,000 and on the 10th of February 1910 the liquidator paid to the plaintiff the sum of Rs. 6,49,024, being the amount of the claim of the plaintiff in respect of the plaintiff's first mortgage of six lacs.

The plaintiff thereon sued the defendants for a declaration that he was entitled to a charge on the balance of the said sale-proceeds for the sum of Rs 2,09,435-9-9, being the said advance of rupees two lacs and interest and for payment of the said sum.

In their written statement the defendants submitted that the receipt of the 5th of August 1909 *did not effect a charge* on the defendants' property. The defendants denied that any

resolution had been passed by the defendants' Board authorising the creation of a charge or that a duly constituted Board existed at the date of the receipt. They also claimed that the defendants were precluded from creating a charge in favour of the plaintiff on account of the existence of a resolution passed by the defendants in favour of the Bank of India, notice of which should be imputed to the plaintiff through his *munim* Dani, who was also his nominee on the defendants' board and through whom, as the defendants alleged, the loan from the plaintiff had been arranged, and who had notice of the resolution.

Jinnah, with him *Strangman* (Advocate General), for the plaintiff—The resolution of June 1907 came to an end in June 1908. The loan was renewed and the Bank received the liquid assets of the Company as security.

Equity takes that as done that ought to have been done. This is an agreement to give a legal mortgage and consideration is paid: therefore there is an equity in favour of the plaintiff: *In re Hurley's Estate*[1]

On the question of notice, (Contract Act, section 229), the loan was transacted by the plaintiff, not by Dani.

This is a charge created by operation of law. See *Govind* v. *Parashram*[2], *Holroyd* v. *Marshall*[3]

Bahadurji, with him *Setalvad,* for the defendants.

DAVAR, J. :—In this case some very interesting and important questions of law arise for consideration, and therefore it is necessary to set out accurately the facts as they are either admitted or proved, before entering into a discussion of the several points to be decided between the parties.

The plaintiff, Raja Bahadur Shivlal Motilal, is a wealthy banker of Hyderabad (Deccan) who carries on an extensive business as banker, merchant and commission agent, through his *munim* and other servants in Bombay. The defendant is a

(1) [1894] 1 I. R. 488.

(2) (1900) 25 Bom. 161.

(3) (1861) 10 H. L. C. 191.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

Joint Stock Company incorporated under the provisions of the Indian Companies Act of 1882 and is now in liquidation. The principal director of the Company and the senior partner in the firm of its Secretaries, Treasurers and Agents was the late Dwarkadas Dharamsey, who, after perpetrating many daring financial frauds, on the 28th of August 1909 committed suicide. Immediately on the death of Dwarkadas a petition was presented to this Court, and by an Order made on the 31st of August 1909 Mr R D Sethna was appointed provisionally the official liquidator of the Company

The plaintiff, Raja Bahadur Shivlal Motilal, had on the 15th of April 1905 advanced to the Company six lacs of rupees and obtained a mortgage of the Mills belonging to the said Company. It appears that, while the first mortgage was subsisting, the defendant-Company was in need of more money, and its principal director and agent Dwarkadas approached the plaintiff, who happened then to be in Bombay, in the beginning of August 1909, and requested him to advance a further sum of five lacs of rupees on the same terms and conditions as the first advance of six lacs and offered to execute a further charge on the Mills property in favour of the plaintiff When the proposal was made to him, the plaintiff said he would consider it.

On the 5th of August 1909 Dwarkadas again approached the plaintiff and represented to him that he was in urgent need of two lacs of rupees that day and asked the plaintiff to make that advance. The plaintiff's affairs in Bombay were then managed by his *munim* Jeynarain Indumal Dani. Under the terms of his mortgage of the 15th of April 1905, Exhibit A, the plaintiff was entitled to have a nominee of his appointed a director of the Company to look after his interests and, in terms of the agreement in the said mortgage contained, the plaintiff had nominated Jeynarain Dani to be such a director and he held that office till the 12th of July 1909 on which date he sent in a letter (Exhibit No. 28), resigning his office as such director. Dani consequently was not on the board of the defendant-Company's directorate on the 5th of August 1909, when Dwarkadas pressed the plaintiff for a part of the proposed

loan of five lacs on a further charge of the Company's property already mortgaged to him.

Before acceding to Dwarkadas's request, the plaintiff consulted Dani and asked him what he thought of the matter, and Dani, after some conversation with Dwarkadas, told the plaintiff that there was no objection to his making the second loan. On this the plaintiff agreed to advance two lacs of rupees on that day on certain terms and conditions which were embodied in a document which was submitted to the plaintiff's Solicitor Mr. Bhaishanker on the plaintiff's behalf and, on Mr. Bhaishanker approving of the document, the same was executed and handed over to the plaintiff and a sum of two lacs of rupees was on that day paid by the plaintiff to the defendant-Company. *The defendant-Company admits receipt of these* two lacs of rupees and does not dispute its indebtedness to the plaintiff in that sum in addition to the sum due under the mortgage. The document executed on the 5th of August 1909 is Exhibit B in this case The plaintiff contends that under the terms and provisions of that document, coupled with the events that happened thereafter, he is entitled to a charge on the mortgaged property of the defendant-Company and is entitled to rank as a secured creditor to the extent of two lacs advanced by him on the 5th of August 1905 and interest thereon. The mortgaged property, the Mills belonging to the defendant-Company, were, under the orders of this Court, sold on the 23rd of December 1909 for Rs 15,25,000. On the 10th of February 1910 the liquidator paid to the plaintiff, out of the sale-proceeds of the said properties, the sum of Rs. 6,49,024-15-1 in full satisfaction of the plaintiff's claim under his mortgage of the 15th of April 1905 The plaintiff was referred to a suit to establish his charge and the liquidator was ordered to hold a sum sufficient in his hands to satisfy the plaintiff's claim for two lacs and interest out of the sale-proceeds, should he succeed in establishing his charge.

The main question in this suit therefore is whether the plaintiff is entitled to a charge on the defendants' property, and to rank as a secured creditor, or merely to share rateably as an

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

ordinary creditor of the defendant-Company. The Company's affairs were found to be in hopelessly involved condition on the death of Dwarkadas and the unsecured creditors are not likely to be paid anything more than a small percentage on the moneys due to them.

The document of the 5th of August 1909 is by far the most important Exhibit in this case and I think it is desirable to set it out *in extenso* here.

Bombay, 5th August 1909.

Re TRICUMDAS MILLS, LIMITED.

Received from Raja Bahadur Shivlal Motilal the sum of rupees two lacs for and on account of the above Mills in part payment of the sum of rupees five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said Mills as a further charge subject to the following arrangement, namely, that the Raja Bahadur will, after inspection of the Mills on or before Monday next, decide whether or not he will advance the said sum of rupees five lacs as a further charge In the event of his deciding to make such advance, the Company will execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at 7 per cent. on the same terms and conditions as are contained in the original mortgage for rupees six lacs now subsisting in favour of the Raja Bahadur, subject to the modification that in the event of such further charge being executed the original loan of six lacs and the further advance of rupees five lacs shall be repayable six years after the date of the further charge and that on execution of the further charge the (sum) of rupees five thousand five hundred shall be paid by the Company to Raja Bahadur as and by way of commission In the event of Raja Bahadur deciding not to make the further advance the said sum of rupees two lacs, together with the original loan of rupees six lacs, shall be repaid immediately with interest at 7 per cent. per annum on the aggregate amount until payment, together with interest at 3½ per cent per annum on the said sum of six lacs for the unexpired term of the mortgage

This document was originally stamped with one-anna stamp and bears the seal of the Company stated to be affixed in the presence of two of its directors, Dwarkadas Dharamsey and Mr. Vishvanath P. Vaidya, who have signed the document, and is countersigned by the firm of Tricumdas, Dwarkadas & Co., the Secretaries, Treasurers and Agents of the defendant-Company. After the advance of two lacs on the 5th of August the plaintiff had the Mills surveyed by a competent engineer in the employ of Messrs. Greaves, Cotton & Company and paid him Rs. 500 as his fee for such survey and report. He himself

went round and saw the Mills and was satisfied that he would be quite safe in making a further advance of five lacs on the security of the Mills property. Accordingly he instructed his solicitors to address a letter to the defendant-Company on the 9th of August 1909 intimating that he was prepared to lend to the Company the sum of three lacs, being the balance of five lacs which was the amount the Company had asked him to advance on the security of their property. The receipt of this letter, Exhibit F, was, after some hesitation and difficulty, admitted by the learned counsel for the defendant who stated, at the end of the plaintiff's evidence, that he was satisfied that the letter must have been sent and received by the Company. There is no doubt whatever that this letter was sent and must have been received by the defendant-Company. Assuming that there would be no difficulty whatever, the plaintiff's solicitors prepared a formal deed of further charge and a fair draft thereof was made and sent to the Company for its approval on the 20th of August 1909. Exhibit M is the letter which accompanied the fair draft To this letter there was no reply and it is quite obvious that at this time the Company's affairs were in great confusion and Dwarkadas must have been in great mental distress That the plaintiff's solicitors must, about this time, have also anticipated difficulties and were on the alert to see that their client's interests were safeguarded, is quite clear from the steps they took to secure their client as far as possible. On the 23rd of August 1909, after some negotiations with the Collector, they got the document, Exhibit B, stamped with a stamp duty of Rs. 1,000-8-0 and on the following day, the 24th of August, they lodged the same for registration. It appears that they were faced with difficulty in having the document registered because it contained no description of the property. That description was added at the foot of the document and was signed by the plaintiff's *munim* Jeynarain Dani on the 1st of September 1909. Mr. Vishvanath P. Vaidya, one of the executing parties, admitted execution before the Registrar, and, on the 3rd of September, Dwarkadas's eldest son Tricumdas, a partner in the firm of

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

ordinary creditor of the defendant-Company. The Company's affairs were found to be in hopelessly involved condition on the death of Dwarkadas and the unsecured creditors are not likely to be paid anything more than a small percentage on the moneys due to them.

The document of the 5th of August 1909 is by far the most important Exhibit in this case and I think it is desirable to set it out *in extenso* here.

Bombay, 5th August 1909.

Re TRICUMDAS MILLS, LIMITED

Received from Raja Bahadur Shivlal Motilal the sum of rupees two lacs for and on account of the above Mills in part payment of the sum of rupees five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said Mills as a further charge subject to the following arrangement, namely, that the Raja Bahadur will, after inspection of the Mills on or before Monday next, decide whether or not he will advance the said sum of rupees five lacs as a further charge. In the event of his deciding to make such advance, the Company will execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at 7 per cent. on the same terms and conditions as are contained in the original mortgage for rupees six lacs now subsisting in favour of the Raja Bahadur, subject to the modification that in the event of such further charge being executed the original loan of six lacs and the further advance of rupees five lacs shall be repayable six years after the date of the further charge and that on execution of the further charge the (sum) of rupees five thousand five hundred shall be paid by the Company to Raja Bahadur as and by way of commission. In the event of Raja Bahadur deciding not to make the further advance the said sum of rupees two lacs, together with the original loan of rupees six lacs, shall be repaid immediately with interest at 7 per cent. per annum on the aggregate amount until payment, together with interest at 8½ per cent per annum on the said sum of six lacs for the unexpired term of the mortgage

This document was originally stamped with one-anna stamp and bears the seal of the Company stated to be affixed in the presence of two of its directors, Dwarkadas Dharamsey and Mr. Vishvanath P Vaidya, who have signed the document, and is countersigned by the firm of Tricumdas, Dwarkadas & Co., the Secretaries, Treasurers and Agents of the defendant-Company. After the advance of two lacs on the 5th of August the plaintiff had the Mills surveyed by a competent engineer in the employ of Messrs. Greaves, Cotton & Company and paid him Rs. 500 as his fee for such survey and report. He himself

went round and saw the Mills and was satisfied that he would be quite safe in making a further advance of five lacs on the security of the Mills property. Accordingly he instructed his solicitors to address a letter to the defendant-Company on the 9th of August 1909 intimating that he was prepared to lend to the Company the sum of three lacs, being the balance of five lacs which was the amount the Company had asked him to advance on the security of their property. The receipt of this letter, Exhibit F, was, after some hesitation and difficulty, admitted by the learned counsel for the defendant who stated, at the end of the plaintiff's evidence, that he was satisfied that the letter must have been sent and received by the Company. There is no doubt whatever that this letter was sent and must have been received by the defendant-Company. Assuming that there would be no difficulty whatever, the plaintiff's solicitors prepared a formal deed of further charge and a fair draft thereof was made and sent to the Company for its approval on the 20th of August 1909 Exhibit M is the letter which accompanied the fair draft To this letter there was no reply and it is quite obvious that at this time the Company's affairs were in great confusion and Dwarkadas must have been in great mental distress. That the plaintiff's solicitors must, about this time, have also anticipated difficulties and were on the alert to see that their client's interests were safeguarded, is quite clear from the steps they took to secure their client as far as possible. On the 23rd of August 1909, after some negotiations with the Collector, they got the document, Exhibit B, stamped with a stamp duty of Rs. 1,000-8-0 and on the following day, the 24th of August, they lodged the same for registration. It appears that they were faced with difficulty in having the document registered because it contained no description of the property. That description was added at the foot of the document and was signed by the plaintiff's *munim* Jeynarain Dani on the 1st of September 1909. Mr. Vishvanath P. Vaidya, one of the executing parties, admitted execution before the Registrar, and, on the 3rd of September, Dwarkadas's eldest son Tricumdas, a partner in the firm of Tricumdas Dwarkadas & Co, admitted his signature in the

1911.

Shivlal Motilal (Raja Bahadur) v. The Birjmohan Mills Company, Limited.

name of his firm and later on, on the 10th of September, admitted his late father's signature on the said document and the document then was duly registered

On behalf of the plaintiff, Mr. Jinnah, who has throughout the hearing expended much labour and argued with great skill and conspicuous lucidity, contended that even if the document of the 5th of August, Exhibit B, did not by itself create a charge on the Mills property, that document, coupled with the letter of the 9th of August 1909, Exhibit F, gave his client an undoubted charge on the said property. He based his contention on the principle that equity will assume that what was intended to be done was done and that, having regard to his client's readiness to advance the balance of three lacs of rupees and have a further charge executed in his favour, the defendant-Company must be taken to have given a charge to the extent of the advance already made

As against this contention, Mr. Bahadurji has urged some very serious objections which require to be most carefully considered. The learned counsel contended that no charge on the property of the Company could be created without a resolution previously passed by its Board of Directors authorising the creation of such a charge, that no such resolution was passed previous to the execution of Exhibit B, that as a matter of fact there was no Board on the date when the two lacs were received and Exhibit B was executed. that the document itself does not create a charge and was not intended to create a charge, and that the Company was at that date labouring under an incompetency which precluded them from giving or creating any further charge It was further urged that this incompetency was well known to the plaintiff's *munim* Jeynarain Dani, who was a director of the Company, as the nominee of the plaintiff (see Exhibit No. 21), and that the knowledge of Dani must be taken to be the knowledge of the plaintiff and therefore, if the plaintiff made the advance with the presumed knowledge of this incompetency, he could not maintain his claim to the charge. There is no doubt that the directors passed no resolution authorising the creation of any

charge previous to the 5th of August 1909, when the plaintiff advanced the two lacs of rupees in question, and in my opinion there is also no doubt that on that day, the 5th of August 1909, there was not a properly constituted Board of Directors of the defendant-Company. Article 90 of the Articles of Association requires that there should be not less than four directors and not more than seven, exclusive of the director *ex officio*. Previous to June 1909 there were six directors of the Company,—Dwarkadas, his son Tricumdas, Mr. Vishvanath P. Vaidya, Mr Mulraj Khatao, Mr. Narotam Morarji Goculdas and Mr. Jeynarain Dani. On the 17th of June 1909 Mr. Mulraj Khatao wrote a letter from Poona resigning his office, and on the same day Mr. Narotam Morarji Goculdas in Bombay wrote to the same effect On the 12th of July 1909 Mr. Dani also sent in his resignation. It appears that Dwarkadas succeeded in persuading Mr. Narotam to withdraw his resignation on the 4th of July and to make an endorsement to that effect on his letter He evidently succeeded in persuading Mr. Mulraj, in spite of his resignation, to attend a meeting of the directors held on the 23rd of July, which meeting was also attended by Mr. Narotam. Article 104 provides that a director may at any time give notice in writing of his wish to resign and, on the expiration of the fifteen days from the service of such notice or the previous acceptance of his resignation by the Board, his office shall be vacant. Mr. Mulraj never at any time withdrew his resignation, and, under the provisions of the Article I have just referred to, he must be taken to have vacated his office fifteen days after the receipt of his letter by the Company, and he must be taken to have vacated his office on the 3rd of July counting the fifteen days from the 18th of June which was the day on which his letter from Poona must have reached the Company. Similarly, Mr. Narotam Morarji Goculdas's office was vacated on the 2nd of July, he having written his letter in Bombay and sent it to the Company on the 17th of June. So that on the 4th of July his withdrawal is of no use. He had ceased to be a director and it was not competent in him to withdraw the resignation which had previously thereto taken effect under the provisions of Article 104.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

Taking therefore into consideration these three letters, Exhibits 26, 27 and 28, I find that on the 5th of August 1909 there were only three directors—Dwarkadas, Tricumdas and Mr. Vaidya—and therefore there was no properly constituted Board in existence. What the effect of the absence of a resolution authorising the creation of a charge and the non-existence of a properly constituted Board of Directors of the defendant-Company has on the plaintiff's contentions, I will discuss later on, after I have dealt with the question of the Company's incompetence or disability to create any charge on the 5th of August 1909

The alleged incompetence of the Company is said to arise from the following facts :—

While the plaintiff's mortgage of the 5th of April 1905 was running, the defendant-Company seems to have been in want of more moneys, and Dwarkadas on behalf of the Company applied to Mr. Stringfellow, the Manager of the Bank of India, for a loan of three lacs of rupees. At a meeting of the Board of Directors of that Bank held on the 7th of June 1907 the proposal was considered and it was resolved "that a fixed loan of three lacs be given at 6½ per cent. on condition that the Company agrees not to further mortgage or charge the property of the Mills *during the currency of the loan*" See Exhibit No. 9.

At a meeting of the Board of Directors of the defendant-Company held on the 11th of June 1907 the Bank's resolution was considered and it was resolved that the condition which the Bank sought to impose on the Company should be accepted and that the Chairman be authorised to give to the Bank a letter of undertaking in terms of that condition See Exhibit No. 22. This acceptance was communicated to the Bank by a letter dated the 11th of June 1907, Exhibit No. 11, written on behalf of the Company by Tricumdas Dwarkadas & Co., the Secretaries, Treasurers and Agents of the Company. A promissory note, Exhibit No. 10, in favour of the Bank was duly executed on the same date. A copy of the resolution was also sent to the Bank. The wording used in the resolution passed by the Company

differs slightly in phraseology from the resolution of the Board of Directors of the Bank. The Company's resolution recites that one of the terms of the loan was that the block property of the Company was not to be further encumbered beyond the mortgage for six lacs in favour of Raja Bahadur Shivlal Motilal, *so long as the loan from the Bank was not paid off.* It was the original intention of the parties that the Company should pass a letter of undertaking to this effect in favour of the Bank and the Company authorized the Chairman of the Board of Directors to give such letter of undertaking. In his letter of June 11, 1907, Exhibit No. 13, Mr. Stringfellow writes that the draft letter of undertaking contemplated between the parties would be forwarded to the Company as soon as it was ready. As a matter of fact, however, the letter of undertaking was never drafted by Mr. Stringfellow, was never sent to the Company, and was never executed by the Chairman. The Bank seemed to have been quite satisfied with the resolution passed by the Company. Although the promissory note was, in form, payable on demand the understanding between the parties, as appears from Exhibit No. 22, was that the loan should be for a fixed period of one year. It seems that when the period of the loan was about to expire, the defendant-Company was unable to pay off the loan, and a few days before the 11th of June 1908, which was the due date for repayment of the loan, Dwarkadas approached Mr. Stringfellow and asked that the loan might be renewed for another year. This proposal was placed before the Board of Directors of the Bank at their meeting of the 3rd of June 1908 and Exhibit No. 14, the minutes of that meeting, record as follows: "Tricumdas Mills, fixed loan of three lacs due 11th June next running at 6½ per cent. Renewal requested. Resolved: Renew at 7 per cent. if possible; if not, at same rate."

The loan, as appears from Exhibit No. 20, the fresh promissory note executed by the Secretaries, Treasurers and Agents of the Company on the 11th of June 1908, was renewed at the same rate of interest and, although as in former case the note was payable on demand, it was understood between the parties

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

that the renewal was for another year. This is clear from Circular No. 72 issued by Tricumdas, Dwarkadas & Co. on the 12th of June 1908 to the directors of the Company in which it is stated that a renewal of the loan had been arranged for a year certain. This arrangement made by Dwarkadas with the Bank was confirmed at a meeting of the Company's directors held on the 6th of August 1908, see Exhibit No. 24. At the end of the second period, the defendant-Company was again unable to repay the Bank of India loan, and Dwarkadas in an undated letter, Exhibit Y, which seems to have been received by Mr. Stringfellow on the 2nd of June 1909, asks him to renew the loan falling due on the 11th for another year Dwarkadas however saw Mr. Stringfellow two or three days before the due date and told him that he "did not want the renewal and that he was going to arrange to pay off the loan."

Mr. Stringfellow says that from Dwarkadas's conversation on that occasion he "gathered that he was arranging to obtain a loan on the second mortgage of the Mills from Shivlal Motilal and was intending to pay off the Bank from that loan."

Mr. Stringfellow waited till the 11th of June 1909 when the loan fell due and, as no payment was made, he became anxious about the safety of his money. On Sunday the 13th he called upon Dani at his bungalow and reminded him of the resolution passed in 1907 when the loan was first made Dani seems to have given him no satisfactory answer and thereupon he saw Sir Sassoon J. David, the Chairman of the Board of his Bank's directors. Sir Sassoon two or three days after the interview handed to Mr. Stringfellow a letter from Dwarkadas, dated the 13th of June 1909, Exhibit No 15 In that letter Dwarkadas states that the Tricumdas Mills are not secondly mortgaged to anybody nor has any undertaking not to mortgage been given to anybody except the Bank of India and, as to the Tricumdas Mills loan, he says it was then under certain negotiations and he would pay off the same within a fortnight. The loan however was not paid off within the fortnight. On Mr Stringfellow, at the expiration of the fortnight, making a demand for payment, Dwarkadas again saw him and asked for three

months' time for the repayment of the loan. The directors of the Bank of India at the Board meeting of the 30th of June 1909 resolved that "the amount due may be renewed for a further period of three months on the same terms as the previous loan with the addition of a full legal lien to be given to the Bank on all the stocks in process."

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY LIMITED.

The Company agreed to give the further security required and a document, Exhibit T, was executed in pursuance of that arrangement on the 23rd of July 1909. About this time rumours as to the financial condition of Dwarkadas and his Mills of a disquieting nature evidently reached Mr. Stringfellow and made him more anxious, and his letter, Exhibit U, dated the 26th of July 1909, addressed to the Agents of the defendant-Company gives clear *indications that for the first time* he *woke up to the fact that* the resolution which was passed on the 11th of June 1907 had never been either passed again or confirmed on two subsequent renewals of the loan. Making the return of the old promissory note passed by the Company a pretext for writing, he, in that letter, recapitulates the securities which the Bank held and amongst such he mentions the resolution of the 11th of June 1907, and ends the letter in the following words:—" Please confirm the resolution as of this date Its terms are that the block property of the Company shall not be further encumbered beyond the mortgage of six lacs in favour of Raja Bahadur Shivlal Motilal so long as the loan from the Bank of India Limited is not paid off." No reply was sent to this letter and Mr. Stringfellow's anxiety became more tense and on the 31st of July 1909 (Exhibit V) he addressed a peremptory reminder in the following words:—" I have not yet received confirmation of the resolution referred to in my letter of the 26th instant. Please give this letter your attention forthwith."

Even this fails to bring any response, and on the 5th of August 1909 Mr. Stringfellow again writes another letter, Exhibit W, in which he says: " With reference to my letter of the 26th ultimo, I have not yet received confirmation of the resolution and shall thank you to send the same early."

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

This also brings no response and in the meanwhile on the same day Dwarkadas obtained from the plaintiff two lacs of rupees under the circumstances which I have set out in the early part of this judgment. On the 10th of August 1909 Mr. Stringfellow addresses a private and confidential letter, Exhibit C, to the plaintiff in which he states that he was informed that the plaintiff had agreed to give a further advance to the Tricumdas Mills on mortgage. He draws the attention of the plaintiff to the resolution of the 11th of June 1907 and informs him that a sum of Rs. 3,51,837-11-6 is due by the Company to the Bank and intimates that that sum must be repaid to the Bank before any further mortgage could be executed. The plaintiff's solicitors on the 14th of August inform Mr. Stringfellow by their letter, Exhibit No. 4, that their client had already agreed to advance five lacs of rupees on a further charge of the Company's property which had already been mortgaged to him and that in pursuance of that agreement he had paid two lacs on the 5th of that month in part payment of the five lacs, and further intimate that their client had agreed to pay the balance as soon as the Company should execute a deed of further charge in his favour. Some further correspondence of no importance takes place between Mr. Stringfellow and the plaintiff's solicitors and nothing of importance happens till the 28th August when Dwarkadas committed suicide and immediately thereafter the Company was taken in liquidation.

The facts I have set out above are based entirely on the documentary evidence recorded in the case and on the evidence given before me by Mr Stringfellow. That evidence is distinguished by great candour and I accept the story told by Mr. Stringfellow as a correct and accurate version of all that took place from the time negotiations were opened by Dwarkadas with him for the loan in June 1907 up to the time of his death. On those facts arise the questions for consideration whether, on the 5th of August 1909, when the plaintiff advanced two lacs of rupees to the defendant-Company, the resolution of the 11th of June 1907 was subsisting and in force, or whether it had exhausted itself at the expiration of the fixed

[illegible] by the Bank [illegible] the defendant [illegible] the [illegible] of August [illegible]

[illegible]

After a careful [illegible] of the documents I have [illegible] given by Mr. Stringfellow, I have come to the conclusion that the loan originally granted on the 10th of June 1907 was exhausted at the end of the twelve months. That was the period agreed upon between the parties as the period of the currency of that loan, and that was the period at the end of which the Bank was to be paid off. If a new arrangement had been made and the defendant Company had committed default in payment the resolution would have continued to be in force till such time as the loan was paid off. But after the period of currency of the loan as agreed upon between the parties had expired, the Bank chose to enter into a fresh agreement with the Company and the renewal of the loan was attempted by the Bank to be at a higher rate of interest but was eventually agreed to be at the same rate, and under those circumstances the renewal of the loan, as it is called, must be treated as a fresh transaction between the parties. Not to further charge or mortgage the Company's property during the second period of the loan was not a term imposed upon the Company or insisted on by the Bank. When, again, the loan was renewed on the 30th of June after default had been committed in payment at the expiration of the second period and the fortnight *beyond the expiry of that period, the Bank imposed other* conditions and insisted on having the security of the liquid assets of the Company and actually obtained an agreement giving them a lien on certain property of the Company: the Bank never referred to or insisted on any resolution not to further charge or mortgage the Company's block property. It is possible, as Mr. Stringfellow says, that there was in his mind an impression that the original resolution was in force all the time, but if that was his impression, in my opinion, the

1911. [illegible] v. THE [illegible] MILLS COMPANY, LIMITED.

1911.

CHIMANLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

impression was an erroneous one, and the conclusion to which I have arrived at is that the original resolution of the Company came to an end when the Bank entered upon negotiations for the renewal of the loan and agreed to renew it in June 1908. That some such apprehension entered the mind of Mr. Stringfellow himself, when he found that the Mill was in difficulties, is abundantly clear from his letters, Exhibits U, V and W.

It seems to me, however, that this question as to whether the resolution was or was not in existence and in force on the 4th of August 1909, is of secondary importance when the next question is taken into consideration, namely, is it open to the defendant-Company to plead its own incompetency to defeat the plaintiff's claim to a charge? I am now assuming, for the purposes of considering this question, that either on the 5th or 9th of August the plaintiff did obtain a valid charge on the Company's property. Whether he did or did not is a question that I propose to consider later on, but I will approach the consideration of the right of the Company to plead this incompetency on the assumption that a charge was validly created. Assuming that the resolution not to further charge was in existence and that the defendant-Company, in breach and violation of their ageement not to further charge, had given a charge to the third party, it is possible that the Bank may have been entitled to plead the Company's incompetency against that third party and to ask that his charge may be postponed till such time as the Bank's debt was paid off Very nice questions of law would then arise between the Bank and such third party, but can it be permissible to the defendant-Company to say, "we committed a breach of our undertaking and in violation of our agreement, we gave a charge to a party which we were not competent to do. Therefore the charge must be defeated." To entertain such a plea and to allow the Company successfully to urge such a contention would be to encourage a fraudulent and defaulting party to plead its own wrong and its own misconduct in order to defeat a claim against itself. Under that resolution, the Bank of India may have had its rights and its remedies but the

[illegible]

[illegible] In any event [illegible] Bank [illegible] with the [illegible] Company [illegible] defendant Company [illegible] its own breach [illegible] the claim of the plaintiff, of the plaintiff's [illegible] that, even on the [illegible] of the 11th of June 1907 was [illegible] August [illegible] incompetency [illegible] the Company [illegible] pleaded by the defendant-Company in its own favour and against the plaintiff.

It was further urged that the plaintiff must be taken to have knowledge of this incompetency and that, if for no other reason, for that alone he is not now entitled to make the claim he makes in this suit. The plaintiff has given his evidence before me. His evidence is very clear and very emphatic and I have no reason whatever to disbelieve any single material statement that he has made to me in the course of his evidence. He denied that he had any knowledge whatever of the Company's undertaking by its resolution of the 11th of June 1907. I accept his denial and it is to be noted that the learned counsel of the defendant-Company has not argued that the plaintiff had any *actual* knowledge of the Company's alleged incompetency. What was argued before me was that his *munim* Dani was on the Board of Directorate of both the Bank of India and the defendant-Company and that he at all events knew of the resolution and *his* knowledge must be taken to be the knowledge of the plaintiff. It is a significant fact that neither the plaintiff nor the defendants called Dani as a witness, and therefore I am unable to say with any degree of certainty whether he withheld this information from the plaintiff from corrupt motives, or whether he was under the impression that the resolution had exhausted itself at

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

the end of the first year of the loan. That he could not have forgotten that a resolution to that effect had been passed is clear from the fact that Mr. Stringfellow on the 13th of June 1909 drew his attention to such a resolution having been passed. Whatever may have been his opinion as to whether the resolution was or was not in force, it was clearly his duty, when he was consulted by his master on the 5th of August, to have told him that in 1907 the Company had undertaken not to further mortgage their property and that the Bank of India's loan was still subsisting. That he did not communicate this information to the plaintiff is beyond all doubt, for, if the plaintiff had the slightest notion that such a resolution had been passed, he never would have risked such a large sum of money without further enquiry and without himself seriously considering and consulting his solicitors as to whether he should or should not make the advance. Dani was specifically asked by the plaintiff whether there was anything against his advancing the two lacs of rupees, and Dani in clear and explicit terms told the Raja that there was no objection to lending the two lacs of rupees He repeated that statement to Mr. Bhaishanker, the Raja's solicitor, who attended to this matter on his behalf.

Taking all the surrounding circumstances and the probabilities into consideration I am reluctantly forced to come to the conclusion that Dani, whose duty it was to tell his master that a resolution had been passed by the Company quite independently of his belief as to whether it was then in force or not, deliberately suppressed this information from the plaintiff from corrupt motives. Dwarkadas on that day was evidently in sore distress for want of moneys. His need was urgent and immediate. When he applied to the Raja for part advance of the contemplated loan of five lacs, the Raja told him to bring his *munim* to him. Dwarkadas then approached the *munim*. Even while the Raja was questioning his *munim*, he says Dwarkadas and Dani had some conversation amongst themselves and Dani then said there was no objection to make the advance of two lacs. The conviction forced on my mind is that Dani deliberately omitted to inform the plaintiff about the

passing of this resolution dishonestly, and that such dishonesty must have been the result of his corruption at the hands of Dwarkadas.

Under those circumstances and also having regard to the fact that this was a transaction which was negotiated directly between the defendant-Company's agent and the plaintiff and *not* between the Company's agent and the plaintiff's *munim*, the provisions of section 229 of the Indian Contract Act cannot be made applicable and the plaintiff fixed with the knowledge of the alleged incompetency of the defendant-Company.

The English Law on this subject, as the result of the authorities on this head, is summed up in one short paragraph in Vol. I of *Halsbury's Laws of England* at page 216, where it is stated as follows:—

"Moreover, where the agent, though acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance"

It is clear to my mind that in this instance Dani, in concealing the information which he clearly had from his master, was guilty of fraud and misfeasance against the plaintiff, and the plaintiff cannot possibly be held to have information and cannot be fixed with knowledge of things which were fraudulently concealed from him by his agent.

The net result therefore is that I find, in the first instance, that the resolution, on which the contention of the Company's incompetency is based, had exhausted itself on the 11th of June 1908 and that it was not in force on the 5th of August 1909. I also hold that the plaintiff when he advanced the two lacs of rupees to the defendant-Company had no knowledge whatever of such a resolution having been passed, that such knowledge was fraudulently concealed by Jeynarain Indumal Dani from his master, and that his master, the plaintiff, could not be fixed with the knowledge which had been from corrupt motives withheld from him.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

I further hold that even if the incompetency had existed as alleged, the defendant-Company can, under no circumstances, be permitted to plead the same in derogation of the rights and claims of the plaintiff, if he is able to establish any, to a charge on their property.

I will now proceed to discuss the effect of my findings, that on the 5th of August 1909, when Exhibit B was executed, the Board of Directors of the defendant-Company was defective, in that there were only three directors instead of the minimum four, as required by the Articles of Association, and that previous to the execution of this document no resolution had been passed by the defendant-Company's Board of Directors authorizing the creation of a charge These undoubtedly are irregularities. The question is, do these irregularities invalidate a charge in favour of third parties without notice of such irregularities and entitle the defendant-Company to plead the irregularities of their own Board of Directors as a bar to the successful establishment of a claim against themselves?

I will discuss these questions again on the assumption that a valid charge was created in favour of the plaintiff. A close study of the authorities establish beyond all doubt that in law neither the want of a resolution nor the defect in the Board of Directorate can affect adversely the rights of third parties who have no knowledge of the existence of such infirmities. The authorities on the subject are both clear and conclusive. It is not necessary to go back further than the case of *Royal British Bank* v *Turquand* (1). In that case the deed of settlement of a Company provided that the directors might borrow on bonds such sums as should from time to time by a general resolution of the Company be authorized to be borrowed. It was averred that there had been no such resolution authorizing the making of the bond in that case. Lord Campbell, in delivering the judgment, says (p. 259).—

"In this case the bond sued upon is allowed to be under the seal of the Company... A *prima facie* case therefore is made for the plaintiffs... No illegality appears on the face of the bond or condition.... If no alle-

(1) (1855) 5 E. & B. 248.

validity is shown as against the party with whom the directors contract under the seal of the Company, excess of authority is a matter only between the directors and the shareholders."

1911.

Shivlal Motilal (Raja Bahadur) v. The Tricumdas Mills Company, Limited.

The Court in that case gave judgment for the plaintiffs. This case went on appeal to the Exchequer Chamber, and that Court in its judgment says (p. 332):—

"We may now take for granted that the dealings with these Companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

The whole Court concurred in confirming the judgment of Lord Campbell in the Court of the Queen's Bench; and this case has been consistently followed and referred to with approval in every subsequent case where the same question has arisen[1].

In *In re Land Credit Company of Ireland. Ex parte Overend, Gurney, & Co*[2], Lord Justice Selwyn discussing the same question observes (p. 469):—

"If, on the other hand, as in the case of *Royal British Bank v. Turquand*[3], the directors have power and authority to bind the Company, but certain preliminaries are required to be gone through on the part of the Company before *that power can be duly exercised, then the person contracting with the directors* is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*[3]. That case . . . may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned."

In *In re County Life Assurance Company*[4], a Life Assurance Company by its Articles of Association appointed a Managing director, but the directors, who were named in the Articles and signed the Memorandum of Association, refused to act and passed a resolution that the Company should not carry on business or allot shares. Notwithstanding this reso-

(1) (1856) 6 E. & B. 327.
(2) (1869) L. R. 4 Ch. 460.
(3) (1855) 5 E. & B. 248.
(4) (1870) L. R. 5 Ch. 288.

1911.

SHIVLAL MOTILAL (RAI BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

lution, the Managing Director and one of the share-holders persisted in carrying on business at the registered office of the Company and allotted shares and appointed directors. The Court, affirming the decision of the Master of the Rolls, held that a policy which a stranger effected at a Company's office and which was signed by three of the *de facto* directors and sealed with what purported to be the Company's seal, was binding on the Company. Lord Justice Giffard in the course of his judgment says (p. 293).—

"I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the General Act under which the Company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the Company that all matters of internal management have been duly complied with."

The case of *Mahony* v *East Holyford Mining Company*[1] goes even further than the previous cases I have referred to. Here an individual, with some friends and dependants of his, started a Company called a Mining Company. Memorandum and Articles of Association were registered, subscriptions were obtained from persons becoming share-holders, and these subscriptions were paid into a bank. The bankers received a formal notice signed by a person, who described himself as a Secretary of the Company, that they were to pay cheques signed by "either two of the following three directors" and countersigned by himself in accordance with a "resolution passed this day." The bankers from time to time, while the business of the Company appeared to be going on, received cheques signed and counter-signed as described and duly honoured them When the fund had been almost entirely drawn out, the Company was ordered to be wound up. It then appeared that there never had been a meeting of the share-holders nor any appointment of directors or of the Secretary but that the persons who had got up the Company had treated themselves as directors and Secretary and appropriated the moneys obtained from the subscriptions. The liquidator attempted to recover from the bankers the amount of the

(1) (1875) L. R. 7 H. L 869.

cheques which they had paid, and the Court held that the bankers were not liable to pay to the Official Liquidator the moneys they paid against the cheques fraudulently drawn on the bank. Lord Hatherley, in the course of his judgment, observes (p. 893) :—

"On the one hand, it is settled by a series of decisions, of which *Ernest* v. *Nicholls*(1) is one and *Royal British Bank* v. *Turquand*(2) a later one, that those who deal with Joint Stock Companies are bound to take notice of that which I may call the external position of the Company. Every Joint Stock Company has its memorandum and articles of association, every Joint Stock Company, or nearly every one, I imagine . . ., has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the Company, and those who so deal with them must be affected with notice of all that is contained in those two documents. After that, the Company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed."

Lord Chelmsford, referring to the statement in the letter that a resolution had been passed, says (p. 890) :—

"I do not think that the bankers receiving this letter were bound to go inside the offices of the Company, to satisfy themselves that it had been so passed."

Many of the remarks made in the course of the judgments of their Lordships in this case, notably the remarks of Lord Hatherley on the duties of shareholders in cases of the kind under discussion, are very apposite and peculiarly applicable to the circumstances of this case. The authorities are equally clear and equally conclusive in cases where the irregularity consists of want of a properly constituted Board of Directors or want of quorum at meetings and is pleaded as a bar to the establishment of claims against the Company.

In *In re Scottish Petroleum Company*(3), the Articles of Association of the Company in question provided that the number of directors should not be less than four and it was

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

further provided that two directors should form a quorum. Shares were allotted to certain parties when there was not a Board of four directors in existence. The Court however held that although there was not a Board of four Directors, the quorum of two was competent to allot shares.

In another case, *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*(1), it appears that the directors of that Company had power under their Articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of directors, at which two only were present, authorized the Secretary to affix the Company's seal to a mortgage which was accordingly done by the Secretary in the presence of the same two directors. It was held that as between the Company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid, Lord Halsbury observing, in the course of his judgment, that persons dealing with Joint Stock Companies were bound only to look at what one may call the outside position of the Company

In the case of *Biggerstaff* v *Rowatt's Wharf, Limited*(2), the question arose as to whether certain securities were validly hypothecated, and there it was held that persons dealing *bonâ fide* with a Managing Director were entitled to assume that he had all such powers as he purported to exercise, if they are powers which, according to the constitution of the Company, a Managing Director can have. Lord Justice Lindly observes (p. 102) :—

"Here the articles enabled the directors to give to the managing director all the powers of the directors . . . The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bonâ fide*. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power"

Another case, *In re Bank of Syria*(3), is again very much in point on this question. The Articles of Association of the

(1) [1895] 1 Ch 629. (2) [1896] 2 Ch. 93.
(3) [1900] 2 Ch. 272 : [1901] 1 Ch 115.

Company provided that the number of members of the Council of Administration which was vested with powers to conduct the affairs of the Company should not be less than three, and that the Council might determine the quorum necessary for the transaction of the business. It was there alleged that the Council had passed a resolution fixing the quorum at three. The number of members of Council, however, became reduced to two, and the question arose whether a resolution passed and security given by two members of the Council in favour of persons who had no knowledge or notice of the irregularity was or was not valid. Mr. Justice Wright held that notwithstanding this irregularity, the security given was valid. The case, *In re Bank of Syria*[1], went to the appeal Court where the judgment of the lower Court was affirmed on this point, Lord Alverstone, Lord Chief Justice, observing that he thought that the authorities to which Wright J. had referred in his judgment, as showing that an objection such as was taken to the irregularity of the proceedings would not affect third parties, truly represented the law and that if the defect in the number of directors were the only objection, there could be no doubt as to the claim being valid.

This doctrine appears to have been followed in an earlier case, where the question was not one of mere irregularity but one of active fraud on the part of the agent of a Company. This is the case of *Shaw* v. *Port Philip Gold Mining Company*[2]. It appears in that case that it was the duty of the Secretary of the Company to procure the execution of certificates of shares in the Company with all requisite and prescribed formalities and to issue them to the persons entitled to receive the same By a resolution of the directors of the Company it was provided that certificates of shares should be signed by one Director, the Secretary and the Accountant. The Secretary issued one of such certificates which was in the usual and authorized form and sealed with the Company's seal, but the signature of the director appended thereto was a forgery and the seal of the Company was in fact affixed thereto

(1) [1900] 2 Ch. 272: [1901] 1 Ch 115. (2) (1884) 13 Q. B. D. 103.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

without the authority of the directors. The Company refused to register the plaintiff as owner of the shares but the Court held that the Company were estopped by the certificate issued by their Secretary from disputing the plaintiff's title to the shares. Mathews J., in concurring with the judgment delivered by Stephen J., says (p. 108) :—

"I am of the same opinion, on the ground that the Company is responsible for the fraud committed by its agent while acting within the ordinary scope of his employment."

The last case I will refer to, and in date it is the latest, is, if anything, far stronger than the cases I have hitherto discussed. In that case of *Ruben* v *Great Fingall Consolidated*[1], the facts were that the plaintiffs advanced in good faith a sum of money which they had borrowed from their bankers to the Secretary of the defendant-Company for their own purposes on the security of a share certificate issued to them by the Secretary which in accordance with the Articles of Association of the Company purported to be signed by two directors, to bear the Company's seal, and to be countersigned by the Secretary. It turned out as a matter of fact that the signatures of the directors were forgeries, and that the seal had been fraudulently affixed by the Secretary without any authority from the defendant-Company. The defendant-Compay resisted an application to register the plaintiffs' bankers in their books as the owners of the shares It was held, on the authority of the case of *Shaw* v. *Port Philip Gold Mining Company*[2], that the defendant-Company were estopped by the certificate issued by their Secretary from disputing the right of the plaintiffs to have the names of their bankers registered as owners of the shares.

On these authorities it is impossible to hold that in this case if the plaintiff Raja Bahadur Shivlal Motilal acquired a charge on the property of the defendant-Company, that that charge is invalid and not binding on the Company because, at the time the charge was given, the Board of Directors had not passed a resolution authorizing the creation of such charge

(1) [1904] 1 K B 650. (2) (1884) 13 Q. B. D. 103.

and by reason of there being not at that time in existence a Board of Directors properly constituted, according to the requirements of the Articles of Association. The plaintiff and his legal advisers assumed, as they had a perfect right to assume, that what was being done was rightly and legitimately done and that all the requirements for the execution of the document, which was executed by the Managing Director and another Director of the defendant-Company and countersigned by the firm of its Secretaries, Treasurers and Agents and bore the Company's seal, had been duly complied with, previous to the execution of that document. The plaintiff and his solicitors had no knowledge whatever that the Board of the defendant-Company's Directors was defective for want of the minimum number of directors required by the Articles of Association. The plaintiff's solicitors had a perfect right to assume that the requisite resolution was previously passed and that everything that was done was done regularly and properly. The first time that the plaintiff's solicitors seem to have a suspicion of irregular proceedings on the part of Dwarkadas was after Mr. Stringfellow's letter to the plaintiff on the 10th of August 1909, Exhibit C. They were evidently put on enquiry then and immediately thereafter followed some very urgent communications between the partners in Bombay and Mr. Bhaishanker at Ahmedabad. They seem to have then only discovered that the requisite resolution had not been passed. Everything that could possibly be done to secure their client was then done by them. The agreement was sent to the stamp office and a stamp of Rs. 1,000-8-0 was paid to the Collector, the description of the property which was wanting was inserted at the foot of the agreement, and it was then lodged for registration and was susequently duly registered. I am asked to say that the registration is irregular, and therefore the document must be treated as if it had never been registered. I am afraid I am precluded from going into the question. I must look at the document as it is presented to me. It is duly stamped and registered, and I cannot here take cognizance of any irregularity in registration, assuming that any such irregularity really did exist, which is extremely doubtful.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

Does this document then, Exhibit B, by itself or taken in conjunction with the plaintiff's solicitors' letter of the 9th of August 1909, Exhibit F, create a charge on the property of the defendant-Company, so as to secure the advance of two lacs of rupees made by the plaintiff on the 5th of August 1909? In considering that question, which is the last and by far the most important in this suit, it is most essential to keep before one's mind the fact that Dwarkadas originally, in the beginning of August 1909, approached the plaintiff not merely for an unsecured loan of two lacs of rupees but for a loan of five lacs of rupees on the further mortgage of the property already mortgaged to him. It was at no time within the contemplation of the plaintiff or of Dwarkadas, the agent of the defendant-Company, that there should be an unsecured advance by the plaintiff of one single rupee The plaintiff never at any time consented that any portion of his money should be advanced on any terms other than on the security of the Company's Mill property. The wording of the document itself leaves no doubt that the advance of part of the five lacs should be treated as a charge on the property. Exhibit B distinctly specifies that the amount of two lacs was received from the Raja Bahadur Shivlal Motilal on account of the above Mills "*in part payment of the sum of five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said Mills as a further charge.*"

The plaintiff made this advance on that day to oblige the Company and to enable its agents to meet its urgent requirements. The plaintiff reserved to himself the option of advancing the balance or recalling the whole of his mortgage-debt including the two lacs on certain terms and conditions mentioned in that document The defendant-Company reserved to itself no option. Exhibit B provides that in the event of the plaintiff deciding to make the advance, the Company "*will* execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at 7 per cent. on the same terms and conditions as are contained in the original mortgage." On the 9th of August when the plaintiff exercised his option and intimated to the defendant-Company that he was prepared to make the advance of the balance of three lacs of rupees, the

Company had no option but to execute a deed of further charge in terms of their agreement. Such deed of further charge was prepared and tendered to the defendant-Company for execution. The defendant-Company was bound on the tender of the balance of three lacs of rupees to execute that further charge. They did not do so. Can they be allowed to plead again their own breach in their own favour and be heard to say, "We were bound to execute a deed of further charge but we did not do so and therefore the plaintiff's advance of two lacs must be treated as unsecured loan to us"? It would be in the highest degree iniquitous to allow the defendant-Company to do so, and in law the Company is not permitted successfully to raise this plea. The authorities on this point are quite as clear and quite as explicit as they have been on other points of law raised in this case.

In *Dighton* v. *Withers*[1], a party, referred to in the case as the intestate, being indebted to another, promised the solicitors of his creditors, whenever required by them, to execute to their clients or such other persons as they might direct, a legal mortgage of his equity of redemption in certain lease-hold premises, subject only to a prior mortgage. When the question arose as to what this promise amounted to in law, the Master of the Rolls, Sir John Romilly, said :—"I am of opinion, that this is a perfectly good mortgage. The intestate had no deeds to deposit, and he gave the best security he could by giving a memorandum in writing by which he promised the solicitors of his creditors to execute a legal mortgage. Well that is an equitable mortgage." And he directed that the residue should be paid to the creditors who were treated as second mortgagees.

In the two cases, *In re The Estate of Hurley* and *of Biddulph*[2], the decision of the Court was to the same effect. *In In re Hurley's Estate* there was an agreement, which ran as follows :—"In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money you may advance to me on

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE TRICUMDAS MILLS COMPANY, LIMITED.

my promissory notes or bills of exchange." And in *In re Biddulph's Estate* there was an agreement in almost similar terms. It was held that these agreements created a valid equitable mortgage on lands and property of the parties executing the same at the time of the agreement for the amount of notes or bills of exchange remaining unpaid at maturity. The learned Judge, in deciding the cases, says:—

"*If a person mortgages or agrees to mortgage all his lands a charge is created* in law or in equity on all the lands of which he is then the owner. * * * * If there is an agreement to execute a legal mortgage from the date of the agreement, or, if the agreement specified a particular day on which, or a particular event after which, the agreement is to operate, then when the date arrives or the event happens, the equitable charge arises."

And it was held in both these cases that

"So soon as those bills or notes matured and remained unpaid the lands of the owner became subject to an equitable charge"

Again in *Tebb* v. *Hodge*[(1)], decided in the Exchequer Chamber, the decision of the Court was to the same effect. In that case the plaintiff agreed to give to one Barrows, and Barrows agreed to take the lease of a premises for twenty-one years and the plaintiff further agreed to lend or obtain for Barrows upon security of the said premises as fitted and licensed a sum of £1,000 two years at 5 per cent. This sum of £1,000 was premium which Barrows had agreed to pay to the plaintiff. Before any lease was granted or any money paid, Barrows became bankrupt and certain complications arose. The Court, affirming the judgment of the Court of Common Pleas, held that until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and Barrows and that the premises as fitted and licensed should stand the security for the £1,000 premium that Barrows had agreed to pay and consequently the plaintiff was held to be entitled to them as equitable mortgagee.

Ex parte Izard. In re Cook[(2)] is another authority for the same proposition. There the debtors agreed that they would, on demand, assign the lease of their premises and their business,

(1) (1869) L. R. 5 C. P. 73. (2) (1874) L. R. 9 Ch 271.

the stock-in-trade and book-debts to the creditors for the advances they received from them. On the debtors becoming embarrassed, the creditors demanded execution of the assignment, in pursuance of the agreement, which was accordingly executed. This assignment was challenged by the trustee in bankruptcy on the debtors filing their petition. It was held that the agreement became a binding security on demand being made and that the assignment based on it was valid.

Eyre v. *McDowell*[1] and *Holroyd* v. *Marshall*[2] are authorities very much to the same effect as the cases I have discussed above.

Lastly, we have a case in our own Court which I think is good authority for establishing the same proposition, although the enunciation of law by Sir Lawrence Jenkins is not on a point on which the case was decided.

In this case, *Govind* v. *Parashram*[3], the parties adjusted their accounts and the debtor agreed to give a mortgage on certain specified immoveable property for a part of the balance that was found due on the judgment, it being agreed that a part of the debt should be paid off by a certain date. In the course of his judgment, Sir Lawrence Jenkins observes (p. 166) :—

"Did the plaintiff by virtue of the agreement actually obtain a charge on the property for the whole amount of the debt . . . . the existing indebtedness constituted a valuable consideration, and it follows that even without the execution of the contemplated mortgage a good charge was created in the plaintiff's favour, which would prevail, not only against the first defendant, but also against the second defendant, who as a judgment creditor could not have a greater interest than his debtor."

It was argued by the learned counsel for the defendant-Company, that this was a mere obiter. It may be an obiter, but it enunciates the law in consonance with high authority and the source from which the obiter proceeds is entitled to very great respect.

(1) (1861) 9 H. L. C. 619. (2) (1861) 10 H. L. C. 191.
(3) (1900) 25 Bom. 161.

1911.

SHIVLAL MOTILAL (RAJA BAHADUR) v. THE RICUMDAS MILLS COMPANY, LIMITED.

my promissory notes or bills of exchange." And in *In re Biddulph's Estate* there was an agreement in almost similar terms. It was held that these agreements created a valid equitable mortgage on lands and property of the parties executing the same at the time of the agreement for the amount of notes or bills of exchange remaining unpaid at maturity. The learned Judge, in deciding the cases, says :—

"If a person mortgages or agrees to mortgage all his lands a charge is created in law or in equity on all the lands of which he is then the owner. * * * * If there is an agreement to execute a legal mortgage from the date of the agreement, or, if the agreement specified a particular day on which, or a particular event after which, the agreement is to operate, then when the date arrives or the event happens, the equitable charge arises."

And it was held in both these cases that

"So soon as those bills or notes matured and remained unpaid the lands of the owner became subject to an equitable charge "

Again in *Tebb* v. *Hodge*(1), decided in the Exchequer Chamber, the decision of the Court was to the same effect. In that case the plaintiff agreed to give to one Barrows, and Barrows agreed to take the lease of a premises for twenty-one years and the plaintiff further agreed to lend or obtain for Barrows upon security of the said premises as fitted and licensed a sum of £1,000 two years at 5 per cent. This sum of £1,000 was premium which Barrows had agreed to pay to the plaintiff. Before any lease was granted or any money paid, Barrows became bankrupt and certain complications arose. The Court, affirming the judgment of the Court of Common Pleas, held that until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and Barrows and that the premises as fitted and licensed should stand the security for the £1,000 premium that Barrows had agreed to pay and consequently the plaintiff was held to be entitled to them as equitable mortgagee.

Ex parte Izard In re Cook(2) is another authority for the same proposition. There the debtors agreed that they would, on demand, assign the lease of their premises and their business,

(1) (1869) L. R. 5 C. P. 73 (2) (1874) L. R. 9 Ch. 271.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr Justice Heaton.

DOSSABHAI BEJANJI MOTIVALA (ORIGINAL CLAIMANT) APPELLANT, *v.* THE SPECIAL OFFICER, SALSETTE BUILDING SITES, RESPONDENT.*

THE SPECIAL OFFICER, SALSETTE BUILDING SITES *v.* DOSSABHAI BEJANJI MOTIVALA (ORIGINAL CLAIMANT) RESPONDENT.*

1912. *March 20.*

Land Acquisition Act (I of 1894)—Compulsory acquisition—Compensation—Collector's award—Government directing Collector to publish his award on a lower valuation.

When the Collector, appointed under the Land Acquisition Act of 1894, once makes the inquiry prescribed by the Act and reaches his own conclusion as to the amount of compensation to be awarded to the claimant, it is not competent to the Government to set aside the conclusion and to direct the Collector to substitute a smaller amount than that which, as the result of his inquiry, he has determined to offer.

CROSS appeals from the decision of J. D. Dikshit, Assistant Judge of Thana.

The Government of Bombay acting under the provisions of the Land Acquisition Act, 1894, issued a notification on the 22nd November 1906, claiming to acquire for a public purpose 1318 acres and 10 gunthas of Khajan lands belonging to the Powai estate, which was under the management of Dossabhai Bejanji

E. H. Waterfield, Special Officer of the Salsette Building Sites, conducted the inquiry into the amount of compensation to be awarded to the claimant. He arrived at the conclusion that compensation should be awarded at the rate of Rs. 50 per acre for the Khajan land. But he directed: "These papers will be submitted to the Collector, as directed by him and in accordance with the Government Resolution No. 8397, R. D., of 30th August 1906, as the compensation I propose to award exceeds Rs. 10,000."

Upon the receipt of orders of Government, the Special Officer published his award, which ran as follows:—

* Cross appeals Nos. 206 and 204 of 1910.

1912.

Dossabhai Bejanji v. The Special Officer, Salsette Building Sites.

The Special Officer, Salsette Building Sites v. Dossabhai Bejanji.

"Government in their memorandum No. 10578 R. D., of 17th October 1908, have directed me to award compensation at the rate of Rs. 4 per acre for Khajan land and Rs. 120 per acre for kharif land, and I therefore make my award accordingly."

The Special Officer then made a reference to the District Court under section 19 of the Land Acquisition Act.

The District Court modified the award by directing that compensation for the Khajan lands should be made at the rate of Rs. 14 per acre.

Both parties appealed to the High Court.

In Appeal No 206 of 1910.

Raikes and *Bhandarkar,* with *S V. Bhandarkar* and *Pherozshah Jamsetji,* for the Powai estate.

G. S. Rao, Government Pleader, for the Crown.

In Appeal No. 214 of 1910.

G. S. Rao, Government Pleader, for the appellant.

Nobody appeared on behalf of the respondent.

Batchelor, J.—This is an appeal under the Land Acquisition Act, and the question really to be decided is whether after the Collector under the Act has made the enquiry prescribed by the Act, and has reached his own conclusion as to the amount of compensation to be awarded to the claimant, that conclusion can be set aside by the Government, and Government can direct the Collector to substitute a smaller amount than that which, as the result of his enquiry, he had determined to offer. In my opinion the question must be answered in the negative.

It arises in the following state of facts. Some 1,798 acres of Khajan land were decided to be acquired under the Act. The present appellant before us is concerned with 1,318 of those acres, the balance belonging to another claimant, who has preferred a similar appeal.

The Resolution of Government directing the publication of the notification for the acquisition of this land is numbered 12104, and is dated the 22nd December 1906. By that

Resolution, the Special Officer, Sálsette Building Sites, was directed to take order for the acquisition of the land. This officer was at the time Mr. E. H. Waterfield who proceeded to institute the enquiries and conduct the procedure prescribed by the Land Acquisition Act. As the result of his enquiries he concludes his judgment in these words:—"I therefore propose to award in the present case compensation for the Khajan land at the rate of Rs. 50 per acre". In point of fact the present claimant has been awarded, not Rs. 50, but Rs. 14 per acre, and it is necessary to explain how this result has been arrived at.

Although Mr. Waterfield's opinion was in favour of an award of Rs. 50 per acre, he felt himself disabled from giving effect to that opinion by reason of certain executive orders of Government contained in their Revenue Department Resolution No. 8397 of 1906. That was a Resolution which embodied in its preamble a letter from the Secretary to the Government of India, Department of Revenue and Agriculture, dated the 28th of June 1906, and which directed that copies of this letter from the Government of India should be forwarded for information and guidance to the various officers and Departments concerned with these matters. The important portion of the Government of India letter so far as this appeal is concerned is to be found in paragraph 3, which it seems desirable to set out *in extenso* It runs as follows.—

"If the officer making the award is not the Collector of the District, he might be required, before making the award, to refer to the Collector any case in which he proposes to award more than 10 per cent. in excess of the original estimate, or more than Rs. 10,000 or some similar limit The Collector should have the power of requiring all cases to be referred to him before the award is given; and the acquiring officer should make his final order according to the instructions received from the Collector."

In pursuance of these instructions Mr. Waterfield conceived it to be his duty to abstain from making a definite award in accordance with his opinion and to submit the papers to his superior officer. He did so in August 1907, and on the 17th October 1908 he received a Memorandum No. 10578 from the Revenue Department of the Bombay Government, in

1912.

DOSSABHAI BEJANJI *v.* THE SPECIAL OFFICER, SALSETTE *BUILDING* SITES.

THE SPECIAL OFFICER, SALSETTE BUILDING SITES *v.* DOSSABHAI BEJANJI.

which the Secretary of that Government was directed "to state that Government approved of the *valuation fixed by* Mr. Stevens on the Khajan land, namely, Rs. 4 per acre. *The* Collector of Thâna should, therefore, be requested to arrange for the issue of that award at that rate in *respect* of the Khajan land." Constrained by this imperative *direction*, Mr. Waterfield couches his final order in the *following* terms:—

"Government in their Memorandum No. 10578 of the 17th October 1909 *have* directed me to award compensation at the rate of Rs. 4 per acre *for Khajan, and* I therefore make my award accordingly."

From this enforced order made by the Collector under the Act the present appellant made a reference to the District Court. The District Court, however, declined to raise the compensation money beyond the sum of Rs 14 per acre, and hence this appeal is brought.

It has been contended by Mr. Raikes, *for the appellant, that* although the appointment of a Collector *under the Act rests* wholly with the local Government, yet when they have once appointed that officer, he must be allowed to prosecute his enquiries under the Act up to their end, without interference from the Government in their executive capacity. It appears to me that that argument must prevail. It is, I think, clear on the facts which I have set out that if the view presented to us by Government is to prevail, the result is simply this: that after the enquiries laid down by the Act have been made and concluded it is open to the Government to interpose, to set those inquiries at nought, and to substitute for the Special Collector's opinion their own opinion as to what is the fair compensation for the land acquired. It appears to me that under the Act no such power as this is vested in the Local Government Reference may be made to section 11 of the Act which provides that on the day fixed for enquiry the Collector shall proceed to enquire into any objections received and into the value of the land and the respective interests of the various claimants, and then "shall make an award, under his hand, of the compensation which, in his opinion, should be allowed for the land"

Section 15 lays down that the Collector in determining the amount of compensation shall be guided by the provisions of sections 23 and 24. And they in turn describe the matters which are, and which are not, to be considered in determining the compensation.

Then in section 25 we have the provision that when the applicant has made a claim to the compensation, the amount awarded to him by the Civil Court shall not be less than the amount awarded by the Collector under section 11

I can only say for my own part that these provisions of the Act seem to me to be too clear to admit of any doubt. In my opinion, when once the Special Collector under the Act has been appointed by the Local Government, the Act casts upon that Collector the duty not only of initiating the enquiries, but of conducting those enquiries to their lawful end in the award of a particular sum for compensation. If the contrary view were accepted it would follow that the Government would be empowered to do, what they claim in this case to have validly done, and that is to set aside, not only the Collector's opinion, but the whole antecedent procedure and enquiry, and to substitute for them an investigation of their own, which was made behind the back of the interested claimant, and which was otherwise inconsistent with the provisions of the Statute.

It was suggested by the learned Government Pleader that the instructions contained in the Bombay Government's Resolution of the 30th August 1906 might be saved as being a rule issued under section 55 of the Act From what I have already said, it would be clear that in my opinion no such argument is tenable inasmuch as those instructions would not be consistent with the Act. In any case the instructions themselves are in the Resolution expressly described as not being rules issued under the Land Acquisition Act It is indeed clear that they are nothing more than administrative orders or instructions and have no further sanction or validity than they claim in that character

1912.

DOSSABHAI BEJANJI v. THE SPECIAL OFFICER, SALSETTE BUILDING SITES.

THE SPECIAL OFFICER, SALSETTE BUILDING SITES v. DOSSABHAI BEJANJI.

Then it was suggested that the order of Mr. Waterfield's proposing to award Rs 50 per acre was not an award but was a mere proposal for an award It seems to me that this argument comes with a certain want of grace from the representative of Government, since if the order fell short of being an award, it fell short only by reason of those very executive orders of the Government whose validity is now in dispute And if I am right in thinking that those orders are of no effect, then it follows that the award is that which Mr Waterfield would have made had he not been restrained by these orders

Reliance was then sought to be placed, as reliance was placed by the learned District Judge, on the case of *Ezra* v. *The Secretary of State*(1) Mr Rao quoted, as specially favouring his contention, the observations to be found at pp. 88 and 89 of the report It seems to me, however, that we should be on very doubtful ground if we assumed that the instructions of the Land Acquisition Board, which were before the Calcutta Bench in that case, bore any real resemblance to the instructions of the Government with which we have to deal now The Board's instructions in *Ezra's case* are not set out but are alluded to merely by the numbers of the Exhibits. It is unnecessary, therefore, to say more than that, in my opinion, there is nothing in the report to satisfy me that those instructions stood on the same legal footing as the orders of Government conveyed to Mr Waterfield

While, therefore, this Court would not be bound by the Calcutta decision even if the facts in both cases were identical, I see no reason to suppose that there is any essential similarity between the two sets of facts The case was afterwards taken on appeal to the Judicial Committee (I. L R. 32 Cal p. 605), but the report contains no ground for suggesting that the argument now attempted on behalf of the respondent was ever presented to the Privy Council There is indeed reason to suppose that, if it had been presented, it would not have succeeded inasmuch as their Lordships are careful to point out

(1) (1902) 30 Cal. 36.

1912.

DOSSABHAI BEJANJI v. THE SPECIAL OFFICER, SALSETTE BUILDING SITES.

THE SPECIAL OFFICER, SALSETTE BUILDING SITES v. DOSSABHAI BEJANJI.

that it is the Special Collector's business "to fix the sum which in his best judgment is the value and should be offered;" in other words, as the Statute enacts, it is the Collector's opinion which is to prevail, not the conflicting opinion imposed on him by another authority acting upon other materials.

In this case, it seems to me, as I have said before, that if the action of Government is to be sustained the result is a modification of the Act by substituting for the Collector's opinion, the opinion of the Executive Government.

For these reasons, I think that the argument for the appellant should be allowed.

The result is that we must set aside the award made in the lower Court, and restore that order for compensation at the rate of Rs 50 per acre, which would have been the Special Collector's award, but for the attempt of Government to substitute another measure.

On the Kharip land the compensation will remain as ordered by Mr. Waterfield at the rate of Rs 120 per acre, and there will be the usual statutory compensation of 15 per cent. over all. There will be interest at 6 per cent. from the date of taking possession until payment under section 34 of the Act.

The appellant to have his costs throughout.

Appeal No. 214 of 1910 is dismissed.

HEATON, J.:—I concur in the conclusion at which my learned colleague has arrived, and I have but little to say on my own account. The principal reason, that which appeals to me most closely as sufficient for holding the opinion which has been expressed, is that the award on which the compensation was tendered to the claimant was not the award of the Special Collector. It does not state the compensation which in his opinion should be allowed for the land. "It does not," to use the words of the Privy Council, "state the sum which in his best judgment is the value". It states the sum which *according to the opinion* of another authority altogether is the compensation which should be awarded. So far as can be judged from the terms of Mr. Waterfield's order, it is a sum which he

1912

Dossabhai Bejanji v. The Special Officer, Salsette Building Sites.

The Special Officer, Salsette Building Sites v. Dossabhai Bejanji.

would never himself have offered as compensation, and which in his judgment apparently is strikingly inadequate That being so, it seems to me quite impossible to hold this award of Rs. 4 an acre to be an award made by a Special Collector. There are only a few words which I would say about the Calcutta case; they are these: to a considerable extent the argument proceeded on the question as to how information might be brought before the Special Collector As to that I do not wish to say a word which would suggest the slightest difference of opinion from what is expressed in the Calcutta judgment But if, and this seems to me very doubtful indeed, that judgment goes the length of saying that the Special Collector should set aside his own opinion and his own conscience and substitute for it an estimate made by some body else, then I should find the very greatest difficulty in following that conclusion.

Appeal No 214 of 1910 is dismissed

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1912 June 18, 21.

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY, APPLICANT, v. BHAGUBHAI DAYABHAI, OPPONENT.*

Bombay Regulation II of 1827, section 56†—Pleader—Pleader in the mofussil—Duty towards client—Winding up proceedings—Pleader must not represent parties whose interests are conflicting.

By the custom of the mofussil a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding.

* Civil Application No. 204 of 1912.

† The section runs as follows :—

A pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed . . . . ; but nothing herein contained shall prevent a party from instituting an action for damages against his pleader when he may consider himself injured by his acts or omissions.

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

The pleader in the mofussil is not merely an advocate—he is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors. For legal advice, for the prosecution of legal proceedings in all their stages, the client depends on the pleader. This dependence makes the position of the pleader peculiarly onerous and binds him to give exclusive attention to the interests of the client throughout any proceedings in which he is engaged.

In winding up proceedings, a single pleader must not represent two different creditors whose interests are known to conflict.

A pleader must not accept a Vakalatnama when he knows that he cannot act for his client throughout the proceedings.

A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with under the disciplinary jurisdiction for making them. It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected.

Held, overruling the contention, that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him.

THIS was an application made under the disciplinary jurisdiction.

The opponent Bhagubhai Dayabhai was a pleader practising in the District Court of Surat.

The facts alleged against him were as follows:—

One Pranjivandas Uttaram filed Suit No. 82 of 1910 in the First Class Subordinate Judge's Court at Surat against the Jaffiralli Spinning and Weaving Company, Limited, and obtained a decree in execution of which he attached certain property of the Company *in July 1910. Pranjivandas* was represented by Bhagubhai in the suit and execution proceedings.

In June 1910, one Gangadas filed a suit against the same Company. He too was represented by Bhagubhai.

In July 1910 one Bhaidas and other creditors of the Company presented Application No. 65 of 1910 for the winding up of the Company by the Court. Maganlal, one of the creditors, applied for stay of the proceedings in execution of the decree obtained by Pranjivandas against the Company and also for stay of the suit filed by Gangadas. In these proceedings Bhagubhai appeared for Pranjivandas and Gangadas and

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

opposed Maganlal's application. The District Court made an order for winding up of the Company, and stayed all proceedings in Gangadas' suit as well as in execution of Pranjivandas' decree. On appeal, the High Court allowed Gangadas to proceed with the suit on his undertaking not to execute the decree without leave of the Court.

In September 1910 Bhagubhai applied on behalf of Pranjivandas for leave to execute the decree obtained by him, asserting a prior lien on the property attached to the exclusion of all other claims excepting that of Abdealli. In October of the same year Bhagubhai applied for sale of the property attached: this application was granted by the Court on the condition that the sale-proceeds should be deposited in Court.

On the 29th of the same month Bhagubhai filed a vakalatnama on behalf of Bhaidas and other creditors whom he had not till then represented in the liquidation proceedings.

On the 10th November 1910 Bhagubhai applied on behalf of Pranjivandas for leave to withdraw the sale-proceeds of the property attached in execution of Pranjivandas' decree and for rateable distribution of the same with Abdealli to the exclusion of all other creditors The Court ordered notices to issue to Bhaidas and other creditors represented by Bhagubhai, but no notices were issued as process fee was not paid. The Court drew the attention of Bhagubhai to the fact that the interests of Bhaidas and other creditors whom he represented clashed with those of Pranjivandas whom he also represented and advised him to withdraw from representing one or the other parties. Bhagubhai refused to do so *Upon the foregoing* facts, the first charge framed against Bhagubhai was that he accepted conflicting briefs in the matter of a winding up proceeding.

The second charge alleged against Bhagubhai was that he made recklessly false charges against the District Judge of Surat. These were contained in several letters which Bhagubhai addressed to the District Judge in the course of inquiry into his professional misconduct in accepting the conflicting

briefs referred to above. They were, as set out in the petition presented by the Government Pleader, as follows :—

(1) In about January 1911 Bhagubhai wrote to the District Judge as follows —

"I may state that I believe that these proceedings have been initiated by the District Judge *suo motu* to prevent me to appear on behalf of Bhaidas Purshottamdas who has been repeatedly requesting the Court to make inquiries into the several criminal offences charged by him against B A Desai, one of the partners in the Agents' firm and with whom the presiding Judge of this Court has great familiarity and who is admittedly one of his friends "

(2) On the 4th April 1911, in an application which Bhagubhai made to the District Court, he stated that the District Judge had framed charges against him for professional misconduct " which were not *bonâ fide* but made maliciously to harm him in his reputation." He went on to say :—

" The District Judge bears strongest grudge against me since 5th January 1911 in consequence of a question asked by me to a witness B A Desai upon instructions of my client Mr Bhaidas about his '*gharoba*' and '*dosti*' with the said witness against whom several charges of misfeasance, breach of trust, misappropriation, have been made by Bhaidas."

(3) On the 7th April 1911, Bhagubhai gave notice to the District Judge, under section 80 of the Civil Procedure Code, in which he said as follows .—

"That the main object of the District Judge, as I believe, was that I should give up the brief of my said client Bhaidas and thereby to prevent his friend the said Balmukundrai from being prosecuted for criminal offences."

(4) Bhagubhai next tendered apology to the District Judge for the statements made by him, and yet a short while after he wrote to the District Judge in the following strain :—

"The prosecution (on charges of misbehaviour framed by the District Judge) is malicious and not a *bonâ fide* one initiated by the District Judge without any reasonable and probable cause and knowing full well that he has no jurisdiction. It is filed with intent to annoy me and put me to unnecessary expense and to wreak vengeance against me for an alleged insult which he considered was given to him by me in my asking a question to the witness B. A. Desai as to his acquaintance with the presiding Judge."

(5) Later on Bhagubhai made the following statements in the course of an application which he presented to the District Court :—

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

"The District Judge wrote a letter to his Subordinate Magistrate in a criminal matter pending before him which he had no right to do. By his action he indirectly biased the mind of the Magistrate as I believe. I do not say he caused the Magistrate to fine me. But his action, I believed, must have induced the Magistrate to return the judgment of guilty . to please his superior he must have been induced to fine me I do not mean to say that he caused the Magistrate to find me guilty and to fine me. But I *bona fide* believe that his said action must have some effect on the mind of the Magistrate"

(6) Lastly, in a letter which Bhagubhai addressed to the District Judge, he made the following statements.—

"In April last, while the inquiry of my alleged misbehaviour was going on before the District Judge, my brother Chunilal Dayabhai sent him three letters by registered post. One of these letters was opened by the then District Judge while giving charge to your honour of all office papers . . and the other . . . two were opened by you When I requested you in my inquiry you told me that they were opened by you I presume from your withholding them from me that they must have been called for by the then District Judge or by someone on his behalf from my enemy Mr Chunilbhai with a promise that he would keep them secret or that he would be saved from criminal prosecution"

The Government Pleader applied to the High Court, submitting that the pleader Bhagubhai was guilty of misbehaviour within the meaning of section 56 of the Bombay Regulation II of 1827 and prayed that he might be dealt with under the disciplinary jurisdiction of the High Court.

The Government Pleader (*G S. Rao*) appeared in person.

Inverarity, with *Manubhai Nanabhai*, for the opponent.

The following cases were referred to in arguments: *In re Wallace*[1]; *Government Pleader* v. *Maganlal*[2]; and *In the matter of Sashi Bhushan Sarbadhicary*[3].

Cur. adv. vult.

HEATON, J.:—This is a case in which Mr. Bhagubhai Dayabhai, a pleader of the Surat Courts, is charged with misbehaviour and neglect of duty within the meaning of those terms as used in section 56 of Bombay Regulation II of 1827.

A good deal of argument in the case has been based on the supposed analogy of pleaders and barristers and the

(1) (1866) L. R. 1 P. C. 283. (2) (1907) 9 Bom L. R. 826

(3) (1906) 29 All. 95.

supposed resemblance between general retainers in the case of barristers and the retainer described in the second clause of section 50 of that Regulation. It seems to me that the analogy is false and the resemblance is unreal. By the custom of the mofussil a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding. This practice is based on, and we think, implied in the words of section 50, clause 3, and section 53, clause 3, of the Regulation. The pleader in the mofussil is not merely an advocate—he is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors. For legal advice, for the prosecution of legal proceedings in all their stages, the client depends on the pleader. This dependence makes the position of the pleader peculiarly onerous and binds him to give exclusive attention to the interests of the client throughout any proceeding in which he is engaged

The proceeding, we are concerned with here, is one relating to the winding up of a Company under the Indian Companies' Act; a more complicated affair than the simple matters in which pleaders were for the most part employed in 1827 when the Regulation relating to them was framed. But the principle is the same, exclusive devotion to the interests of the client throughout the proceedings. No doubt it is possible in winding up proceedings for a single pleader to represent several independent creditors of a Company whose interests are not identical. Clearly, however, a pleader must not represent two different creditors whose interests are known to conflict. It is said that Mr. Bhagubhai allowed himself to represent two creditors whose interests were known to conflict.

The facts are these: prior to the winding up order one Pranjivandas for whom Mr. Bhagubhai acted as pleader had obtained a decree and was taking out execution against the Company. The winding up proceedings were promoted amongst others by one Bhaidas and several other creditors who formed a group which, for brevity's sake, may be called the Bhaidas group. Mr. Bhagubhai who previously

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

had represented Pranjivandas in the suit and execution proceedings came into the winding up proceedings to represent Pranjivandas in them and to press his client's claim to obtain satisfaction of his decree out of the Company's assets, in preference to or in priority over the general body of creditors. In an order, dated 23rd July, the District Judge of Surat said "As to whether the attached properties should be allowed to be sold for the decrees (one Abdeally as well as Pranjivandas had a decree) or not, we think it is proper to postpone orders pending the disposal of the winding up petition". This order was made in a contentious proceeding to which the Bhaidas group were parties. This order did not satisfy Pranjivandas who appealed against it unsuccessfully Meantime he tried to induce the District Judge to modify the order, also unsuccessfully. In these proceedings he defined his opponent to be the Official Liquidator The Bhaidas group were not referred to. Nevertheless in so far as the interests of Pranjivandas conflicted with those of the general body of creditors they conflicted with the interests of the Bhaidas group.

After these proceedings on 10th October Mr. Bhagubhai on behalf of Pranjivandas applied to the District Judge, in the matters of the winding up, naming the Official Liquidator as his opponent, for leave to execute his decree by selling certain goods which had been attached on condition that the sale-proceeds were deposited in Court. This application was granted on the 14th October.

On October 28th the Bhaidas group who previously had been represented by a different pleader, employed Mr. Bhagubhai to represent them in the liquidation proceedings. They knew Mr. Bhagubhai already represented Pranjivandas and they instructed him that he was not to represent them—to put it broadly—where the peculiar interests of Pranjivandas might conflict or apparently conflict with theirs. Such we take to be the effect of the understanding. The Vakalatnáma was in terms general and to that extent misleading to one who read it in ignorance of the conditions when it was executed.

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

It is said, and in our opinion rightly said, that Mr. Bhagubhai ought not to have accepted this Vakalatnáma. He seems to have been perfectly frank with his clients; his conduct was absolutely consistent with honesty; but in our opinion he acted unprofessionally. He thinks not; so we will explain as best we can the reasons for our opinion. The basis of it has already been stated: having undertaken to act for Pranjivandas in the liquidation proceedings, it was his duty to act for him and exclusively in his interests throughout. So far, we think, Mr. Bhagubhai will agree The interests of Pranjivandas did, in certain material particulars, conflict with the interests of the general body of creditors including the Bhaidas group. Mr. Bhagubhai could not, therefore, act for the Bhaidas group throughout the proceedings That is admitted; he did not attempt it, he only became their pleader in the liquidation proceeding on the express understanding that he could not act for them throughout. This being so he was wrong to act for them at all if it was apparent at the time (as admittedly it was) that he could not act for them throughout. It is absolutely a question of principle Did he professionally do right or wrong? The defence set up is that he was right absolutely—that it was open to him to accept the Vakalatnáma with limitations. It is not asserted or suggested in defence that the Bhaidas group could not get another pleader or that there were other special circumstances which brought another equally important principle into play. The defence is a denial of the principle that a pleader must not accept a Vakalatnáma when he knows that he cannot act for his client throughout the proceedings.

What followed is of interest as showing that disregard of this principle is likely to lead to an embarrassing situation. Later on the District Judge heard Mr. Bhagubhai argue an application on behalf of Pranjivandas to be paid the sale-proceeds then deposited in Court. The Judge seeing that this might not be to the interests of the general body of creditors thought that the Bhaidas group should have notice of the application. He asked Mr. Bhagubhai whether that group objected. Mr. Bhagubhai replied they did not; but bethinking himself that he had better enquire on the point, asked for time. Time was given.

1912.

GOVERNMENT PLEADER *v.* BHAGUBHAI DAYABHAI.

He made enquiry and informed the Court that the Bhaidas group as a body did not consent to Pranjivandas' application. Now this was an embarrassing position to every one concerned; to the Judge, who was appealing to one pleader to ascertain the views of two antagonistic parties for both of whom that pleader held a Vakalatnáma; to Pranjivandas whose pleader was pledged to his interests, but who also gave information in the interests of some of his opponents; to the Bhaidas group whose pleader could not represent them in the matter; and finally, could he have realised it, to Mr. Bhagubhai himself. We do not say that any real harm ensued but the position was one which ought not to arise; and it did arise because Mr. Bhagubhai allowed himself to take a Vakalatnáma from clients in whose interest it was known to be impossible for him to act throughout the liquidation proceedings.

We think his failure to refuse the Vakalatnáma was a neglect of duty but we do not think it necessary in this matter to do more than point this out. The circumstances do not require a punishment.

The next matter is more flagrant. The District Judge called on Mr. Bhagubhai to explain his unprofessional conduct in accepting a Vakalatnáma for the Bhaidas group. Mr. Bhagubhai sent a written reply on the 4th January 1911. On the 25th January he sent a further written application in the matter to the District Judge in which he stated that he believed the proceedings to have been initiated by the District Judge *suo motu* from motives, described in the application but which I need not set out. These motives as described are scandalous and shocking. Similar motives were attributed to the Judge in subsequent applications made to him. In this Court we have not heard one single word of apology or regret from or on behalf of Mr. Bhagubhai. He still apparently believes that these scandalous allegations are true. If he is so misguided, so ready to attribute evil where none need be surmised, he should at least have the decency to refrain from expressing these noxious beliefs in applications presented in the Court of the Judge whom he insults. Conduct such as

Mr. Bhagubhai's is not merely misbehaviour, it is misbehaviour of a peculiarly wanton and offensive kind Various defences were made such as that we had no jurisdiction, that the pleader spoke as an accused person and had the license of such. He was a pleader and was writing to the Court as a pleader throughout; so there is no substance in these defences.

Mr. Bhagubhai is ordered to deliver up his Sanad to the Registrar of this Court to be endorsed. He should be informed that the Sanad will not at present be returned to him and he will not be allowed to practice as a Pleader When he has satisfied this Court that he has made such public apology to the Court of the District Judge, Surat, and personally to the Judge whom he insulted as the occasion requires, he may apply for the return of his Sanad This Court will then consider and deal with the application as it thinks fit. Costs on Mr. Bhagubhai

On the 21st June 1912, Bhagubhai tendered an apology in Court and applied for restoration of his Sanad.

BATCHELOR, J —We have heard this application by the pleader Mr Bhagubhai who petitions the Court that as he has now made the apology, which by our previous order he was directed to make, the Court should restore to him his Sanad as a pleader.

We observe that in the apologies which Mr. Bhagubhai has seen fit to submit in deference to our order, he has taken care to insert words, apparently of justification, to the effect that the insulting statements used by him towards the Judicial Officer whom he maligned were used in "excitement and on the spur of the moment."

The record of the case shows that these words are not true, and that so far from the insulting statements having been once uttered in an access of excitement or under a sudden impulse, the fact is that they were repeated on divers occasions after Mr. Bhagubhai's attention had been drawn to them, and indeed after he had once expressed regret for them.

Even now Mr. Bhagubhai's main contention before us has been that the insulting imputations were made by him under a

1912.

GOVERNMENT PLEADER v. BHAGUBHAI DAYABHAI.

mistaken notion that he was, as of right, entitled to make them and that is a totally different defence from the defence suggested by the use of the phrase as to excitement on the spur of the moment.

Mr. Bhagubhai, however, expresses his consent to the deletion of these words to which we have objected, and I am, therefore, prepared to accept these apologies with the offending words deleted, as a sufficient compliance with our previous order.

I must, however, express my inability to follow Mr. Bhagubhai when he supposes that a tepid and ungracious apology such as this is sufficient entirely to remove the effects of the reiterated insults which he lodged at high judicial officers. There was nothing in our previous order to lead him to suppose that any apology, still less such an apology as he has tendered, would be an end of the matter and would have the immediate effect of restoring him to his status as a practising pleader. It appears to me that the recovery of that status must still be deferred and that this Court must mark by a proper penalty its sense of the grave and scandalous misconduct of which Mr. Bhagubhai has unfortunately rendered himself guilty.

I think it no excessive penalty to order that his Sanad be retained for a period of six months from this date, and that he do pay the costs of this application.

HEATON, J. :—I concur. I would only add this that apparently the form of the order we made has been looked upon, at any rate, by Mr. Bhagubhai himself, as expressing some idea that as soon as an apology was made he would be allowed to continue to practice as a pleader. But the true meaning of the order was that until an apology was made we were not prepared to consider that he should ever be allowed to practice as a pleader. As soon as the apology was made and the ground cleared in that way, then we were prepared to consider for how long we should suspend him from practice and I quite agree with my learned colleague that the period of six months is one that does not err on the side of severity.

Order accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kt., Acting Chief Justice, and Mr. Justice Batchelor.

LAKSHMANRAO KRISHNAJI LIMAYE (ORIGINAL PLAINTIFF), APPELLANT, *v.* BALKRISHNA RANGNATH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1912 *June 17.*

*Transfer of Property Act (IV of 1882), section 59—Mortgage bond—Attestation by only one witness—Bond judicially found to be invalid and unenforceable—Government Notification—Retrospective effect—Exemption of certain Districts from the operation of section 59 of the Transfer of Property Act (IV of 1882)—Subsequent suit to enforce the mortgage—*Res judicata*—Rights vested under decrees not affected.*

In execution under a money-decree certain property mortgaged to the plaintiff on the 6th September 1893 was attached and was about to be brought to sale. The plaintiff, thereupon, applied that the property should be sold subject to his mortgage lien. The Court rejected the plaintiff's application on the ground that the mortgage bond was invalid and not enforceable because it was attested by only one witness and not by two as required by section 59 of the Transfer of Property Act (IV of 1882). The plaintiff, thereupon, brought a suit in the year 1905 for a declaration that his mortgage bond was valid and operative according to law and, therefore, enforceable The suit came up in second appeal to the High Court which, on the 14th August 1908, finally decided that the plaintiff's mortgage was void and, therefore, inoperative under section 59 of the Transfer of Property Act (IV of 1882). In the meanwhile, on the 24th June 1908, the Government of Bombay issued a notification exempting certain Districts including the Poona District in which the mortgaged property was situate, from the operation of section 59 of the Transfer of Property Act (IV of 1882). The notification was given a retrospective effect from the 1st January 1893. On the strength of the said notification the plaintiff applied to the High Court for review of judgment and his application being rejected, he, in the year 1910, instituted the present suit to enforce his mortgage and both the lower Courts having rejected the claim on the ground of *res judicata*, the plaintiff preferred a second appeal

Held, confirming the decree, that the decree passed by the High Court in 1908 still subsisted and was not affected by the Government Notification although the notification had retrospective effect. The notification could not abrogate rights which had been judicially declared and had been merged in decree

Kay v. *Goodwin*(1) and *Lemm* v *Mitchell*(2), followed

SECOND appeal against the decision of C. Roper, District Judge of Poona, confirming the decree of V. G. Kaduskar, Subordinate Judge of Haveli, at Poona.

* Second Appeal No 527 of 1911.

(1) (1830) 6 Bing 576 (2) [1912] A. C. 400.

1912.

LAKSHMANRAO KRISHNAJI v. BALKRISHNA RANGNATH.

Suit to recover mortgage money by sale of mortgaged property.

The facts were as follows:—

The property in suit belonged to Govind and Waman Rangnath Bhople (defendants 2 and 3). They mortgaged it to Lakshmanrav Krishnaji Limaye (plaintiff) for Rs. 1,400. The mortgage-deed was registered and attested by one witness only.

One Shankar Thakar, a creditor of Govind and Waman Bhople, obtained a money-decree against them and in execution attached the property mortgaged to Lakshmanrav Limaye. Thereupon the mortgagee applied to the Court that the property should be sold subject to his mortgage lien. The Court found that the mortgage bond gave no right to the mortgagee over the property as it was attested only by one witness and not by two as required by section 59 of the Transfer of Property Act (IV of 1882). His application was, therefore, rejected. Thereupon he, in the year 1905, brought a regular suit for a declaration that his mortgage-deed was valid and enforceable. The proceedings in the suit came up in second appeal to the High Court which, on the 14th August 1908, finally dismissed the suit holding that the deed was void under section 59 of the Transfer of Property Act (IV of 1882).

While the second appeal was pending in the High Court, the Government of Bombay, on the 24th June 1908, issued a notification exempting the Districts of Poona, Sátára, Sholápur and Ahmadnagar from the operation of section 59 of the Transfer of Property Act, 1882. The notification was given a retrospective effect from the 1st January 1893. It ran as follows:—

In exercise of the power conferred by section 1, paragraph 5 of the Transfer of Property Act, the Governor in Council with the previous sanction of the Governor-General in Council is pleased to exempt from the provisions of sections 59 and 123 of the said Act with effect from 1st January 1893 to the 1st July 1910, the following territories administered by the Government of Bombay:—

The Districts of Poona, Sátára, Sholápur and Ahmadnagar.—Notification No 4059, dated the 24th May 1910, published at page 765 of the *Bombay Government Gazette*, Part I, dated the 26th May 1910.

On the strength of the said Notification the plaintiff applied to the High Court for review of judgment and his application being rejected, he, on the 29th July 1910, instituted the present suit to recover the mortgage debt, namely, Rs. 1,400 principal and Rs. 1,400 interest, in all Rs 2,800 by sale of the mortgaged property. The Subordinate Judge dismissed the suit holding that the claim was barred as *res judicata*. His reasons were as follows :—

It is nowhere urged that the decision of the High Court would not be a *res judicata*, it being a finding on a point of law, and that the cause of action is not the same in the present suit as it was in the previous suit If the cause of action be different, a finding on a point of law cannot operate as *res judicata* which is obvious But if it be the same, i e., if the dispute is identical, then it would operate as *res judicata*, *vide* I. L R 10, Cal 1087, 15 All. 327, 26 Mad 104 and 31 Bom 128 There cannot be any manner of doubt that the cause of action is the same in the previous suit as well as in the present suit The dispute is the same and an additional prayer in the plaint to recover the money would not alter the character or the sameness of the dispute. This prayer of the plaintiff is not allowable unless the lien of the plaintiff's debt on the land is upheld But it has been negatived by the decision of the High Court which is a final adjudication of the claim of the plaintiff to proceed against the property in dispute The point is so clear that I need not elaborate it.

On appeal by the plaintiff, the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Jayakar with *M. V. Bhat* for the appellant (plaintiff) :—The former suit was forced upon us owing to the Court's order in the miscellaneous proceeding disallowing our mortgage lien. The object of the suit was to obtain a declaration of our lien and to set aside the order passed against us in that proceeding. The causes of action in the two suits are quite distinct.

According to the decision of the High Court, the bond being not attested by two witnesses was, on the date of that decision, void and not enforceable according to law. In other words, we had no cause of action based on the mortgage bond when the previous suit was brought. But when the Government issued the notification exempting the Poona District from the operation of section 59 of the Transfer of Property Act and gave to it retrospective effect, we got a cause of action

1912.

LAKSHMANRAO KRISHNAJI v. BALKRISHNA RANGNATH.

for the first time by reason of the notification having rendered the bond valid and enforceable at law. Therefore, the plea of *res judicata* cannot arise.

D. A. Khare for respondent 5 (defendant 5) was not called upon.

CHANDAVARKAR, ACTING C. J. :—This second appeal raises the question of *res judicata* under the following circumstances. On the 8th of September 1893 defendants Nos. 2 and 3 mortgaged the property in dispute to the plaintiff. Some time after that, a creditor of the said defendants, who had obtained a money-decree against them, attached the property in execution and was about to bring it to sale in 1893, when the plaintiff applied to the Court for an order that the property should be sold in execution of the decree, subject to his, that is, the plaintiff's mortgage of the 8th of September 1893. In that miscellaneous proceeding the Subordinate Judge raised this issue: Had the plaintiff the mortgage lien claimed by him? And as the result of his investigation the Subordinate Judge found that the plaintiff's bond was invalid and unenforceable, because it was not attested by two witnesses, as required by section 59 of the Transfer of Property Act. The plaintiff then brought a regular suit to get rid of the effect of the order passed by the Subordinate Judge in the miscellaneous proceeding. That was a suit for a declaration that the plaintiff's bond was valid according to law, and, therefore, enforceable. The suit was dismissed by the Subordinate Judge, but in appeal the District Judge held that the bond was valid and operative according to law, and, therefore, enforceable. There was a second appeal to this Court on the 14th of August 1908 and this Court reversed the District Court's decree and restored that of the Subordinate Judge, holding that the plaintiff's bond was void and therefore inoperative for want of attestations as required by section 59 of the Transfer of Property Act. The result of that litigation, therefore, was that the defendants acquired as against the plaintiff a vested right under the decree of this Court in Second Appeal, by which the plaintiff was held not entitled to set up his

1912.

LAKSHMANI KRISHNAJ v. BALKRISHI RANGNATH

mortgage and bring the property to sale. The plaintiff, however, applied for a review of the decree of this Court on the ground that on the 24th of June 1908 Government had by a notification exempted certain districts, including the district of Poona, from the operation of section 59 of the Transfer of Property Act and given that notification a retrospective effect from the 1st of January 1893. The Court having rejected the review application, the plaintiff brought the suit, which has led to the present second appeal, to enforce his mortgage.

Both the Courts below have held that the plaintiff's claim is *res judicata* by reason of the decree of this Court, of the 14th of August 1908.

But it is contended for the plaintiff that the Government Notification takes his suit out of the principle of *res judicata*. That, however, is not a sound contention. It is true that the Government Notification exempted certain districts from the operation of section 59 of the Transfer of Property Act with effect from the 1st of January 1893, and the present case comes from one of those districts. But the Government Notification cannot have a higher operation than a legislative enactment, and in the case of a legislative enactment, which repeals a previous law either partially or wholly, the principle is that it cannot affect vested rights acquired under decrees. That principle, enunciated by Tindal, C. J. in *Kay* v. *Goodwin*[1], has been followed recently by the Privy Council in *Lemm* v. *Mitchell*[2]. Tindal C J. said :—"I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never been passed ; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law". Citing Tindal C. J. with approval, their Lordships of the Judicial Committee of the Privy Council say in *Lemm* v. *Mitchell*[2] that explicit language on the part of the Legislature is necessary to warrant

(1) (1830, 6 Bing. 576.

(2) [1912] A. C. 400 at p. 406.

1912

LAKSHMANRAO KRISHNAJI v. BALKRISHNA RANGNATH.

a Court "in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

Here the decree of this Court, of the 14th of August 1908, still subsists. It is not affected by the Government Notification although that notification had a retrospective effect. The notification could not abrogate rights which had been judicially declared and had become merged in decrees. On this ground the decree of the Court below must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kt, Acting Chief Justice, and Mr. Justice Batchelor.

BAI GULAB (ORIGINAL PETITIONER), APPELLANT, v. THAKORELAL PRANJIVANDAS (ORIGINAL OPPONENT), RESPONDENT.*

Hindu Law—Minor—Capacity to make will—Indian Majority Act (IX of 1875), section 3.

A Hindu minor, who has not attained majority as provided in the Indian Majority Act, 1875, is not competent to make a will of his or her property.

APPLICATION for probate.

The testatrix was a Hindu and was above 16 years in age though she was under eighteen. By her will she disposed of property belonging to her.

The petitioner applied for probate of the will.

It was contended by the opponent that as the testatrix had not attained majority, as provided in section 3 of the Indian Majority Act, 1875, she was not competent to dispose of her property by making a will.

The District Judge agreed with this contention and rejected the application on the following grounds :—

* First Appeal No. 196 of 1911.

1912.

BAI GULA
v.
THAKORELA

"It was argued that the object of section 2 of the Indian Majority Act is to confine the operation of the Act to all acts which are of a contractual nature, and that it does not relate to the capacity of persons to act in other matters. It is doubtful whether marriage, in the case of a Hindu, can be termed a contract, and I am therefore not convinced that the argument is sound, but the question has been decided by the High Court of Allahabad in the judgment reported in the Allahabad Law Journal for April 1911 (Vol. VIII, No. 14) and the ruling is against the applicant's contention."

The applicant appealed.

L. A. Shah, for the appellant.

G. K. Parekh, for the opponent.

CHANDAVARKAR, ACTING C. J. :—The question in this appeal is whether a Hindu minor is competent to make a will. The right of a Hindu to make a will is based upon the principle that he is competent to make a disposition of his property to take effect after his death to the same extent to which he can make a disposition of it in his own life-time as a gift. It is clear law that a Hindu minor cannot make a gift of his property in his life-time. If that is so, it follows that he cannot make a will in respect of that property.

But it is argued in the present case that though the testatrix, having been under eighteen years of age, was a minor according to the Indian Majority Act, she was more than fourteen years' old and that, therefore, under the Hindu Law she was not a minor. On that ground we are asked to hold that, according to that law, she was competent to make a will.

But the Indian Majority Act has modified the Hindu Law on the question of minority except in respect of dower, divorce, marriage and adoption.

It is argued, however, by Mr. Shah for the appellant that the Indian Majority Act has not affected the rule of Hindu Law on the question of minority so far as the competency of a Hindu to make a gift *inter vivos* is concerned That argument is clearly unsustainable. It is true the Legislature has not modified the Hindu Law so far as the competency of a Hindu to make a gift or a will is concerned, but the Legislature has laid down what the age of majority shall be for the purposes of that competency. The Hindu law having been

1912.

BAI GULAB v. THAKORELAL.

repealed to that extent, the law now is that no Hindu can make a will who is less than eighteen years of age.

This is in accordance with the decision of the Allahabad High Court in *Harduari Lal* v. *Gomi*(1). We must confirm the order with costs.

Order confirmed.

R. R.

(1) (1911) 8 All. L. J. 385.

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kt, Acting Chief Justice, and Mr. Justice Batchelor.

EKNATH PANDOBA KOSTI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. DAGADURAM SAMBHURAM AND OTHERS (ORIGINAL PLAINTIFFS 1—4 AND DEFENDANT 3), RESPONDENTS *

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 47 and 48(1)*—Transfer of Property Act (IV of 1882), section 85—Limitation Act (IX of 1908), Schedule II, Article 11—Agriculturist Mortgagor—Suit—Conciliator's certificate—Mortgagor necessary party along with other persons interested—Exclusion of time spent in obtaining conciliator's certificate—Limitation*

Defendants 1 and 2 brought a suit on a mortgage against defendant 3 and while the suit was pending, defendant 3 mortgaged the same property, namely, a house

---

* Second Appeal No. 408 of 1911.

(1) Sections 47 and 48 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are as follows :—

47. No suit, and no application for execution of a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a conciliator has been appointed is a party, shall be entertained by any Civil Court unless the plaintiff produces a certificate in reference thereto obtained by him under section 46 within the year immediately preceding.

Explanation.—The expression "Civil Court" in this section does not include a Mamlatdar's Court under Bombay Act No III of 1876 (*to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts*).

48. In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under section 39 and the grant of the certificate under section 46 shall be excluded.

along with other properties to the plaintiffs. Defendants 1 and 2 having obtained a decree, they applied for execution and sought to recover the decretal debt by sale of the house. Thereupon, the plaintiffs intervened and applied that the house should be sold subject to their mortgage lien. The plaintiffs' application being disallowed they brought a suit against defendants 1, 2 and 3 to establish their right founded on their mortgage. The suit was brought within one year of the order rejecting their application after the exclusion of the time taken up in obtaining the Conciliator's certificate under sections 47 and 48 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), defendant 3 being described in their mortgage as an agriculturist. Defendants 1 and 2 contended that defendant 3 being not a necessary party, the Conciliator's certificate was unnecessary and the suit was time-barred.

Held, that under the provisions of the Transfer of Property Act (IV of 1882) defendant 3 was a necessary party to the suit which was brought on the strength of the mortgage and he being an agriculturist, the Conciliator's certificate was necessary and the suit was, therefore, not time-barred.

Second appeal against the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree of L. G. Dhekne, Subordinate Judge of Rahuri.

The facts were as follows.—

The property in suit, a two storeyed house, belonged to Rajmal Manikchand, defendant 3, and he had mortgaged it to Eknath Pandoba and Ramchandra Eknath, defendants 1 and 2. On the 17th February 1904 the mortgagees brought a suit, No. 59 of 1904, against Rajmal to recover the mortgage-debt. While the said suit was pending, Rajmal mortgaged the said house along with four other properties to the plaintiffs under a deed, dated the 1st July 1904. The suit brought by the mortgagees Eknath and Ramchandra against Rajmal was decreed in their favour on the 6th February 1905. They applied for the execution of their decree and sought to recover the mortgage-debt by the sale of the house. In the meanwhile the plaintiffs intervened and applied that the attached property, namely, the house should be sold subject to their mortgage lien. The plaintiff's application was registered as Miscellaneous No. 13 of 1906. The Subordinate Judge investigated the plaintiffs' claim and, on the 19th June 1907, he rejected their application. Defendant 3, Rajmal, being described in the plaintiffs' mortgage-deed as an agriculturist, they on the 8th June 1908, applied for a conciliator's certificate under sections 47 and 48 of the Dekkhan Agriculturists' Relief Act (XVII of

1912.

EKNATH PANDOBA *v.* DAGADURAM.

1879) to enable them to file a suit against defendant 3 along with defendants 1 and 2. They obtained the conciliator's certificate on the 15th July 1908 and on the same day filed the present suit against defendants 1, 2 and 3 under Order XXI, Rule 63 of the Civil Procedure Code (Act V of 1908) and prayed for the setting aside of the order passed against them in the Miscellaneous Proceeding, No. 13 of 1906, and for a declaration that the mortgage-deed executed in their favour by defendant 3 was a true and genuine transaction. Though the suit was apparently filed one year after the date of the order in the miscellaneous proceeding, the plaintiff sought to bring it within the period of one year by deducting the time taken up in the conciliation proceeding

Defendants 1 and 2 contended that the plaintiffs' mortgage was a fraudulent transaction entered into for the purpose of establishing the status of defendant 3 as an agriculturist while he was not an agriculturist and for delaying and defeating the execution of their decree against him, that defendant 3 was not a necessary party and that the claim was time-barred.

Defendant 3 did not file any written statement.

The Subordinate Judge found that the plaintiffs' mortgage was a genuine and *bonâ fide* transaction and was valid against defendants 1 and 2, that defendant 3 was not a necessary party but he was a proper party to the suit, that defendant 3 was an agriculturist and that the suit was in time. He, therefore, made the declaration sought for by the plaintiff.

On appeal by defendants 1 and 2 the decree was confirmed.

Defendants 1 and 2 preferred a second appeal.

P. P. Khare for the appellants (defendants 1 and 2).

Coyaji, with *C. A. Rele*, for the respondents (plaintiffs).

CHANDAVARKAR, ACTING C. J. :—It is contended in support of this second appeal that the presence of the mortgagor as a party-defendant was not necessary, and that, therefore, the conciliator's certificate does not avail the plaintiffs to bring the suit within the period of limitation under Article 11 of Schedule II to the Limitation Act.

This point is urged on the following facts: Defendants Nos. 1 and 2, the present appellants, obtained a decree upon their mortgage against their mortgagor, defendant No. 3. The present plaintiffs were not parties to that suit. Having obtained a decree upon the mortgage, the said defendants sought to sell the property in satisfaction of their decree. Thereupon the plaintiffs intervened, claiming a lien upon the property in virtue of a mortgage in their favour subsequent to the mortgage of defendants 1 and 2. In the miscellaneous proceedings in which they intervened, the Court held their mortgage not proved and their application that the property should be sold in satisfaction of the mortgage-decree of defendants Nos 1 and 2 subject to their own mortgage was rejected. That was on the 19th of June 1907. The present is a suit to establish their right founded on that mortgage and its object is to get rid of the order passed against them in the miscellaneous proceedings Ordinarily the suit should have been brought under Article 11 of the Limitation Act on or before the 19th of June 1908. But it was filed on the 15th of July 1908. *Primâ facie*, therefore, the suit was barred by limitation

The plaintiffs, however, seek to bring the suit within the period of limitation under Article 11 on the ground that as their mortgagor, defendant No. 3, was an agriculturist, they had to apply for a certificate from the conciliator under the Dekkhan Agriculturists' Relief Act. They claim deduction of the period occupied in obtaining the certificate.

It is conceded by Mr. P P Khare for the appellants that, if the period occupied by the application for the conciliator's certificate is excluded, the present suit is in time. But it is argued that that period should not be deducted, because, defendant No. 3 was not a necessary party to the suit. Mr. Khare contends that the suit was merely to set aside the order passed on the 19th of June 1907 in the miscellaneous proceeding. To that order, it is true, defendant No. 3 was not a party, but, whether he was a party to that order or not, the present suit is one brought on the strength of a mortgage, and the Transfer of Property Act directs that all persons

1912.

EKNATH PANDOBA v. DAGADURAM.

interested in mortgaged property should be made parties to a suit on the mortgage. Therefore defendant No. 3 was a necessary party and the suit must be held to have been in time.

The decree is confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL

Before Sir Narayan Chandavarkar, Kt., Acting Chief Justice, and Mr. Justice Batchelor.

1912. *June 26.*

SHIDAPPA VENKATRAO (ORIGINAL PLAINTIFF), APPELLANT, v. RACHAPPA SUBRAO (ORIGINAL DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), section 17—Suit to obtain a declaration as adopted son and to establish title to property—Injunction with respect to a house—Declaration with respect to other property—Valuation of the plaint—Valuation for pleader's fees—Special jurisdiction of the First Class Subordinate Judge—Appeal to the District Court—Second Appeal—Return of the memorandum of appeal for presentation to the High Court—Jurisdiction.

In a suit for a declaration that the plaintiff was the adopted son of V., and as such was entitled to his property, the plaint was valued at Rs. 130 for a declaration of the rights and at Rs 69,016-9-0 for pleader's fees. The plaintiff prayed for an injunction restraining the defendant from interfering with plaintiff's rights in respect of a house which was already in his possession and the injunction was valued at Rs 5. With respect to the other property which was attached by the Collector after V.'s death, the plaintiff sought for a bare declaration of his rights as V.'s adopted son. The suit was tried by the First Class Subordinate Judge of Belgaum in his special jurisdiction and he allowed the claim

The defendant appealed to the District Judge and he, notwithstanding the plaintiff's preliminary objection that the appeal lay to the High Court and not to his Court, held that the First Class Subordinate Judge had no jurisdiction to try the suit under his special jurisdiction because the suit was for a declaration and consequential relief which was valued at Rs 5 for the purposes of Court fees, and the valuation for the purposes of jurisdiction being the same as for the purposes of Court-fees, that valuation was less than Rs 5,000. The District Judge, therefore, entertained the appeal and having found that the plaintiff's adoption was not proved, disallowed the claim.

* Second Appeal No. 152 of 1911.

On second appeal by the plaintiff,

Held, reversing the decree, that the First Class Subordinate Judge was entitled to try the suit under his special jurisdiction and his decree was appealable to the High Court.

The plaint distinctly laid claim to two subjects, namely, two kinds of properties. First, there was property in the possession of the Collector and its value exceeded Rs 5,000 and that property having been in the possession of the Collector, it was not necessary for and allowable to the plaintiff to ask for an injunction He was only entitled to a declaration of his title The other subject-matter of the suit was the house as to which the plaintiff was entitled to ask for a declaration and consequential relief and to put his own valuation on the plaint.

SECOND appeal against the decision of E. Clements, District Judge of Belgaum, reversing the decree of V. V. Phadke, First Class Subordinate Judge.

The plaintiff sued for a declaration that he was the lawfully adopted son of the deceased Venkatrao, Desai of Ingli in the Belgaum District, and as such entitled to the property of the deceased and for an injunction to the defendant not to obstruct the plaintiff in the enjoyment of such of the property (a house) of the deceased as was in plaintiff's possession The plaint alleged that Venkatrao died on the 24th January 1909, that he adopted plaintiff, who was a member of the same family, on the 24th November 1908, that the defendant was trying to give one of his own sons in adoption to Venkatrao and when it was settled that the plaintiff was to be adopted, the defendant maliciously applied to the Collector and the Court of Wards took possession of all the property of the deceased with the exception of the dwelling house and that as the defendant disputed the plaintiff's adoption, it became necessary to bring the present suit. The plaint was valued at Rs. 135, that is, at Rs. 130 for the declaration and at Rs. 5 for the injunction, but it was stated in the plaint that the value of the whole property comprised in the suit was Rs. 69,016-9-0.

The defendant answered that the plaintiff's adoption was false and the deed of adoption was fabricated, that the plaintiff and the deceased Venkatrao were not members of an undivided family, that the deceased Venkatrao was very ill on account of paralysis and owing to that illness his intellect had become

1912.

SHIDAPPA VENKATRAO v. RACHAPPA SUBRAO.

weak at the time of the alleged adoption and he was not in a position to understand the meaning or effect of adoption and that the adoption was illegal.

The Subordinate Judge found that the adoption set up by the plaintiff was proved and valid, that the deceased Venkatrao had sufficient mental capacity to understand the nature of what he was doing and that the plaintiff was not the nearest heir of the deceased. He, therefore, awarded the claim by granting the declaration and injunction sought for by the plaintiff.

The defendant appealed and the plaintiff took a preliminary objection as to the jurisdiction of the District Court to hear the appeal. In over-ruling the plaintiff's preliminary objection the District Judge observed :—

A preliminary objection is taken to this Court's jurisdiction to hear the appeal. The respondent urges that although the plaint is properly valued at Rs 135 for the purpose of the Court-fees, the suit was entertained by the lower Court, the First Class Subordinate Judge of Belgaum, on the understanding that the Court's jurisdiction depended on the market value of the deceased's estate. The property in this district being situated in the Athni and Chikodi Tálukas, the lower Court could only entertain the suit in its special jurisdiction It is therefore argued that the suit having gone to trial on the understanding that the value of the subject-matter was above Rs. 5,000, the appeal must lie to the High Court. It appears to me that this question admits of but one answer I am not concerned with what the learned Subordinate Judge or the parties may have thought. The suit did not come within the lower Court's special jurisdiction and the lower Court had no jurisdiction whatever to try it. Whatever the result of that may be, the appeal undubitably lies to this Court, under section 26 of the Bombay Civil Court's Act which provides that the appeal lies to the High Court in suits decided by a First Class Subordinate Judge in either his ordinary or special jurisdiction in which the value of the subject-matter exceeds Rs. 5,000. In *Vachhani Keshabhai v. Vachhani Nanbha*, 11 Bom. L. R. 30 following a Calcutta case, the Bombay High Court have held that the valuation of the relief in the plaint is to be accepted both for the purposes of Court-fees and jurisdiction.

Having come to this decision, it appeared to me necessary to consider the point whether I was bound to set aside the proceedings of the lower Court and return the plaint for presentation to the Athni or Chikodi Court. As this step would have led to a deplorable waste of time and money and had nothing to commend it, neither party even hinting that he had been prejudiced by the lower Court's erroneous assumption of jurisdiction, I suggested to the pleaders and counsel that they should consult one another as to the best means of obviating this evil and in

particular asked them to consider whether it would not be possible to allow the plaint to be revalued at Rs. 5,001 and to return the memorandum of appeal for presentation to the High Court. In the discussion that followed it was made clear that the parties could not by agreement confer a jurisdiction upon the lower Court which it never had. As the plaint was properly valued for Court-fees, section 12 of the Court Fees Act had no application. The Court therefore could not order that the plaint be revalued. The upshot of the argument was that, unless the aid of the need section 21, Civil Procedure Code, could be invoked, this Court had no alternative but to return the plaint Section 21, Civil Procedure Code, is not mentioned in the statement of objects and reasons. It appears, however, to have been enacted on the analogy of section 11 of the Suits Valuation Act (Act VII of 1887). Whereas the latter section has the effect, subject to certain restrictions, of ratifying a trial which was held in a Court without jurisdiction, owing to an error in the valuation of the plaint, the former section appears to cure a defect of territorial jurisdiction, under similar restrictions. There can be no doubt that section 21 would cover a case where the place of residence of the defendant or the situation of the property in suit had been in good faith wrongly described in the plaint I know of no general principle which would serve to distinguish such a case from the present, where the mistake appears to have been one of law The wording of the section is very wide, and in giving a wide interpretation to it, I rely on the principle that an Appellate Court should endeavour to rectify irregularities and do substantial justice. If I am right in my interpretation of the section, I need not consider the decisions of the Privy Council which lay down that a trial without jurisdiction is void *ab initio*, because the Legislature made an inroad upon that doctrine in section 11 of the Suits Valuation Act, and have a perfect right to modify it still further by statute. Section 21 begins "no objection to the place of suing shall be allowed." There are two canons of interpretation which would make that section clearly applicable to the present case, first, that when the language of a statute is plain and unambiguous, and admits of one meaning only, that meaning and that meaning alone, must be given to it, and, secondly, that "remedial enactments must be construed literally." This enactment was evidently passed for the expedition of justice and for ousting delays in its administration. It is therefore a "remedial" measure and must be extended as far as the words will admit to every case within its purview. I therefore hold that neither party is at liberty in the present case, as there has admittedly been no failure of justice consequent upon the lower Court's erroneous assumption of jurisdiction, to ask this Court in appeal to return the plaint for presentation to the proper Court. *A fortiori* it would be improper for the Court to take such a step *suo motu*.

The plaintiff appealed.

Robertson with *G. S. Rao* (Government Pleader), *G. K. Parekh* and *N. A. Shiveswarkar* for the appellant (plaintiff) :— The District Judge erred in holding that he had jurisdiction to entertain the appeal and he relied upon the decision in

1912.

HIDAPPA
NKATRAO
v.
ACHAPPA
SUBRAO.

Vachhani v *Vachhani*[1]. But that case has property in suit is valued at Rs. 60,000 an a small house valued at Rs. 250 the whole in the possession of the Collector as Court respect to it we ask for a mere declarati relief as for a declaratory decree at Rs. 130 Court-fee of Rs. 10 covering that amount. Rs. 10 was the proper Court-fee. Court Fe Article 17 (iii) With respect to the hou injunction restraining the defendant from n possession. The relief for injunction we we paid the *advalorem* Court-fee Court-Fe section 7, iv (*d*). The total amount of Rs. 135 for the purposes of Court-fees and at that amount But it is mentioned in t value of the subject-matter of the suit is m and thus the suit became cognizable by the Class Subordinate Judge of Belgaum in its s and the decree was appealable to the High C 25 and 26 of the Bombay Civil Courts Act District Judge has jurisdiction to hear a value of the subject-matter of the suit is les section 8 of the Bombay Civil Courts Act

In the present case the property in suit is and not the relief claimed. If the value of been less than Rs 5,000, the plaintiff woul the suit either in the Court at Athni or those Courts are presided over by Subor Second Class: sections 15 and 16 of the Civi

In a suit for a bare declaration affecting pro than Rs. 5,000 the test for determining property for the computation of Court-fee that for determining value for the purposes is only in a few cases that the value for bot same: section 8 of the Suits Valuation Act

jurisdiction must be taken to be what it would be if the suit had been for the possession of the property · *Ganapati* v. *Chathu*[1]. If the present suit had been for the possession of the property, the valuation for the purposes of Court-fees would have been Rs. 69,000 and odd. The suit was, therefore, properly brought in the Court of the First Class Subordinate Judge in its special jurisdiction. An appeal against the decree in such a suit lies to the High Court and not to the District Court · *Ajubhai Rawabhai* v *Bai Hiraba*[2], *Bai Mahkor* v. *Bulakhi Chaku*[3], *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*[4], *Shrimant Sagajirao* v *S. Smith*[5], *Ganapati* v. *Chathu*[1], *Ibrayan Kunhi* v. *Komamutti Koya*[6].

The decision in *Vachhani* v *Vachhani*[7] has no application because the injunction therein asked for related to the very property with regard to which a declaration was sought for, and the suit came under section 8 of the Suits Valuation Act VII of 1887. In the present case the injunction is sought with respect to a very small part of the property and a bare declaration is asked for with respect to the bulk of the property The suit comprises two subjects arising out of the same cause of action, but those subjects are quite independent of each other. It would not have been necessary for us to ask for an injunction with respect to the house if the defendant had not threatened obstruction to our possession.

Coyaji and *Jayakar* with *K. A. Padhye* for the respondent (defendant) .—The decree of the lower Court is correct and should be upheld. The injunction was prayed for in consequence of the declaration and also as a consequential relief. The suit being for a declaratory decree and consequential relief it fell under section 8 of the Suits Valuation Act. The Court Fees Act provides only for two kinds of suits, namely, those for a declaration and those for a consequential relief, which in the present case would be the injunction. It does not contem-

(1) (1889) 12 Mad. 223
(2) (1896) P. J. 327.
(3) (1874) 1 Bom. 538.
(4) (1906) 30 Mad. 18.
(5) (1895) 20 Bom. 736.
(6) (1891) 15 Mad. 501.
(7) (1908) 33 Bom. 307.

1912.

SHIDAPPA VENKATRAO v. RACHAPPA SUBRAO.

plate a third kind of suit, namely, partially for a declaration only and partially for both a declaration and injunction. Such being the present suit, the value to be determined for computing the Court-fees is the same as the value for the determination of jurisdiction: section 8 of the Suits Valuation Act. Therefore the District Court had jurisdiction to entertain the appeal: *Vachhani* v. *Vachhani*[1], *Bhimbai Jamalbhoy* v. *Mariam Binte Abdul*[2], *Pherozshaw* v. *Waghji*[3], *Collector of Belgaum* v. *Shrimant Sundrabai*[4].

With respect to the place of suing section 21 of the Civil Procedure Code and section 11 of the Suits Valuation Act will apply

CHANDAVARKAR, ACTING C J. —This appeal arises out of a suit which had been brought by the present appellant in the Court of the Subordinate Judge, First Class, Belgaum, for a declaration that he was the adopted son of one Venkatrao, deceased, and that as such he was entitled to his property.

The plaint was valued at Rs. 130 for a declaration of the right, and at Rs. 69,016-9-0 for pleaders' fees. The plaintiff alleged in the plaint that a house forming part of the subject-matter of the suit was in the possession of the plaintiff himself and that the defendant was obstructing him. He prayed for an injunction to issue restraining the defendant from interfering with the plaintiff's rights in respect of that house. The injunction was valued at Rs. 5. The plaintiff further alleged that the rest of the property, belonging to the deceased Venkatrao and valued at Rs 69,016-9-0, was in the possession of the Collector, having been attached by him after the death of Venkatrao. As to that property, the plaintiff sought a bare declaration of his right as Venkatrao's adopted son. As all the property was partly in Athni and partly in Chikodi, and, therefore, outside the ordinary jurisdiction of the Subordinate Judge's Court at Belgaum, that Court could try the suit only under its special jurisdiction.

(1) (1908) 33 Bom. 307
(2) (1909) 34 Bom. 267.
(3) (1911) 13 Bom. L. R. 158.
(4) F. A. No. 121 of 1910 (Unrep.).

1912.

SHIDAPPA VENKATRAO v. RACHAPPA SUBRAO.

The Subordinate Judge tried the suit under his special jurisdiction and held that the appellant was the adopted son of Venkatrao. A decree was accordingly passed in favour of the plaintiff.

The defendant appealed to the District Court at Belgaum. There a preliminary objection was raised by the present appellant, who was respondent in the appeal, that the appeal lay, not to the District Court, but to this Court, because the suit had been tried in the Court of the Subordinate Judge at Belgaum under that Court's special jurisdiction. The learned District Judge held that the Subordinate Judge, First Class, at Belgaum, had no jurisdiction to try the suit under his special jurisdiction, because the suit having been for a declaration with consequential relief and the relief having been valued at Rs 5 for the purposes of Court-fee, the valuation for the purposes of jurisdiction was the same as that for the purposes of Court-fee and that valuation was less than Rs. 5,000, according to the decision of this Court in *Vachhani v. Vachhani*[1]. The District Judge was also of opinion that the Subordinate Judge had no jurisdiction to try the suit under his ordinary jurisdiction, because the property to which the suit related was outside that jurisdiction. Nevertheless, the District Judge held that he had jurisdiction to dispose of the appeal on the merits, because neither party "hinted that he had been prejudiced by the lower Court's erroneous assumption of jurisdiction". The District Judge found the adoption set up by the plaintiff not proved and disallowed his claim.

From that decree this second appeal has been filed. The principal contention in support of the second appeal is that the suit was within the special jurisdiction of the Subordinate Judge, First Class, Belgaum, and that, therefore, an appeal from his decree lay, not to the District Court, but to the High Court.

The appellant's argument is as follows: the suit comprised two subjects—(1) property in the custody of the Collector, of the value of more than Rs. 5,000, and (2) property in the

(1) (1908) 33 Bom. 307.

1912.

SHIDAPPA VENKATRAO v. RACHAPPA SUBRAO.

plaintiff's possession of the value of less than Rs. 5,000. Plaintiff asked for a bare declaration of title as to the former; as to the latter he asked for a declaration with consequential relief, valued at Rs. 5. Though the latter relief was of a value less than Rs. 5,000, the former exceeded that value; hence the suit was within the special jurisdiction of the Subordinate Judge, First Class, at Belgaum.

It has been argued for the respondent that as this was a suit for a declaration with a consequential relief and the consequential relief had been valued at Rs. 5, the suit must be treated as one for a declaratory decree with consequential relief and that, therefore, the valuation having been less than of Rs. 5,000, the suit lay in the First Class Subordinate Judge's Court at Belgaum under its ordinary jurisdiction.

But that is not the correct view to take of the plaint. In the plaint, the appellant distinctly states that he laid claim to two subjects, *i. e.*, two kinds of properties. First, there was property in the possession of the Collector and its value exceeded Rs 5,000. That property having been in the possession of the Collector, it was not necessary for and allowable to the plaintiff to ask for an injunction. He was entitled to ask only for a declaration of his title. Then there was the other subject-matter of the suit, namely, the house as to which the plaintiff was entitled to ask for a declaration and consequential relief. With reference to this second subject-matter, it was open to the plaintiff to put his own valuation on the plaint, and he did it, and if the suit had been confined to this second subject-matter, then it would have been within the ordinary jurisdiction of the Subordinate Judge's Court at Belgaum, provided the house was within the limits of that jurisdiction. But plainly it was not.

It is, however, contended before us for the respondent that, according to the Court Fees Act, read with the Suits Valuation Act, we have provision made only for two classes of suits, one a suit for a bare declaration and the other a suit for a declaration with consequential relief. There is, it is urged, no third class of suits provided for, namely, a suit for a bare declaration

and also for a declaration with consequential relief. Upon this reasoning we are asked to ignore the relief in the plaint for a bare declaration and to look solely to the relief by way of declaration and consequential relief.

Section 17 of the Court Fees Act is an answer to the argument in question. It provides that—

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

Here there are two distinct subjects, one, the property with the Collector valued at Rs. 69,000 odd; the other, the house valued at less than Rs. 5,000. The declaration as to the former can only be of a valuation of more than Rs 5,000 both for Court-fee and jurisdiction. The valuation of both would be the aggregate of the fees to which the plaint would be liable, having regard to these two subjects. Therefore the suit lay within the special jurisdiction of the Subordinate Judge, First Class, at Belgaum and the appeal could lie only to this Court and not to the District Court.

The decree, therefore, of the District Court must be reversed and the memorandum of appeal to that Court must be returned to the respondent in this appeal for presentation to this Court.

The appellant must have his costs of this appeal and also of the appeal to the District Court.

Decree reversed and memorandum of appeal returned for presentation to the High Court.

G. B. R.

1912.

Shidappa Venkatrao v. Rachappa Subrao.

plaintiff's possession of the value of less than Rs. 5,000. Plaintiff asked for a bare declaration of title as to the former; as to the latter he asked for a declaration with consequential relief, valued at Rs. 5. Though the latter relief was of a value less than Rs. 5,000, the former exceeded that value; hence the suit was within the special jurisdiction of the Subordinate Judge, First Class, at Belgaum.

It has been argued for the respondent that as this was a suit for a declaration with a consequential relief and the consequential relief had been valued at Rs. 5, the suit must be treated as one for a declaratory decree with consequential relief and that, therefore, the valuation having been less than of Rs 5,000, the suit lay in the First Class Subordinate Judge's Court at Belgaum under its ordinary jurisdiction.

But that is not the correct view to take of the plaint. In the plaint, the appellant distinctly states that he laid claim to two subjects, *i. e.*, two kinds of properties. First, there was property in the possession of the Collector and its value exceeded Rs. 5,000. That property having been in the possession of the Collector, it was not necessary for and allowable to the plaintiff to ask for an injunction. He was entitled to ask only for a declaration of his title. Then there was the other subject-matter of the suit, namely, the house as to which the plaintiff was entitled to ask for a declaration and consequential relief. With reference to this second subject-matter, it was open to the plaintiff to put his own valuation on the plaint, and he did it, and if the suit had been confined to this second subject-matter, then it would have been within the ordinary jurisdiction of the Subordinate Judge's Court at Belgaum, provided the house was within the limits of that jurisdiction. But plainly it was not.

It is, however, contended before us for the respondent that, according to the Court Fees Act, read with the Suits Valuation Act, we have provision made only for two classes of suits, one a suit for a bare declaration and the other a suit for a declaration with consequential relief. There is, it is urged, no third class of suits provided for, namely, a suit for a bare declaration

The decree is, therefore, reversed and the *darkhast* sent back to be disposed of according to law on the merits. 1912.

HARIDAS NANABHAI v. VITHALDAS KISANDAS.

Costs hitherto incurred will be costs in the *darkhast.*

Decree reversed.

R. R.

PRIVY COUNCIL.*

RAGHOJIRAO SAHEB (DEFENDANT) *v* LAKSHMANRAO SAHEB (PLAINTIFF).

[On appeal from the High Court of Judicature at Bombay.]

* P. C. 1912. *June* 12, 13, 14, 18. *July* 18.

Sanad, construction of—Grant creating title of Rájah of Deur in 1862—Meaning of "Lands attached to Deur"—Whether confined to lands in Sátára where Deur is situated, or extended to other lands in Bombay Presidency—Use of contemporanea expositio *in interpretation of documents—Jághir, nature of tenure—Saranjam—Inám—Vatan—Hakk—Nature of evidence in interpreting documents—Alteration of records*

The plaintiff and the defendant were brothers, descendants of the Bhonsle family (Rájahs of Nágpur) whose possessions lapsed to the British Government in 1853. The object of the suit was to have it declared that the whole of the property in dispute (all situated in the Bombay Presidency) belonged to the two brothers in equal shares. The elder brother, the defendant (appellant), was Rájáh of Deur, and his defence was that he had succeeded to the property in suit under the law of primogeniture, as an appanage to the title of Rájáh conferred on him by a sanad issued by the Governor General, Lord Canning, in 1862. The question depended mainly on the construction of that sanad, in which the expression "lands attached to Deur" had been interpreted by the Courts in India as giving to the defenda only lands in the district of Sátára in which Deur is situated, the rest of the lands being declared to be partible between the two brothers.

Held by the Judicial Committee (reversing those decisions) that on the true construction of the sanad, a construction indicated by the history of the family and the other documentary evidence in the case, considered on the principle of *contemporanea expositio,* as a guide to its interpretation, the defendant was entitled to the whole of the property in the Bombay Presidency, and not only to that in Sátára, as an appanage to the title.

This was to be inferred from the official documents for 50 years, the language used in all of them being applicable to the possessions of the Rájahs in the Bombay

---

* *Present* :—LORD SHAW, SIR JOHN EDGE, and MR. AMEER ALI.

1912.

RAGHOJIRAO SAHEB v. LAKSHMANRAO SAHEB.

Presidency as a whole; from the intention of the Government to make suitable provision for the newly created title, and enable the holder to support it with becoming dignity which he could not do if less were given; and from the facts, as gathered from documents, that the Rájahs (of Nágpur) had properties in the Central Provinces as well as in the Bombay Presidency, and the footing on which the Government had all along proceeded during a long period was to allot the latter as an appanage to the title, and the former to be partitioned among the younger sons, which was done in 1887, 1893 and 1899.

As to the tenure on which the lands were held, the whole of the lands previous to the re-grant in 1862 were "jághir" lands, implying no grant of the soil, but a personal grant of the revenues to the grantee. A grant of such lands was personal, not hereditary, and resumable at pleasure The grant being personal and temporary, the lands were necessarily impartible. The impartibility and unity which attached to personal service was not related to, but on the contrary was *distinct from, the idea of succession by force of law to the impartible lands*, they, therefore, could not be decided to be subject to the rule of primogeniture.

The Marátha equivalent for "jághir" was "saranjám" which came in course of time to be applied to the lands. "Saranjám" was not confined to the lands in Sátára as held by the lower Courts. The terms "saranjám," and "inam" were not mutually exclusive. "Inám" was a term of mere *generic significance applicable to a Government grant as a whole*. Rights in the Bombay Presidency were dealt with comprehensively, and as covered not by one name, but by all, or at least many of the names applicable to land and revenue rights as "inám," "saranjám," "vatan," hakk, &c. The argument to the effect that the Sátára property, and that alone, was treated as "saranjám," while the other properties were throughout treated as "*inám*," was contrary to what were admitted to have been the original entries in the Collector's *books*. No reliance, therefore, could be placed on such a denomination of those lands.

The original state of the records before the so-called "corrections" were made, *and not with the doubtful and unexplained* interlineations and alterations, was that to which a Court of law should have looked as evidence. Too restricted an application had been made by the Courts below of the term "*the lands attached to Deur*," which their Lordships were of opinion extended to the whole of the lands in suit, which was consequently dismissed.

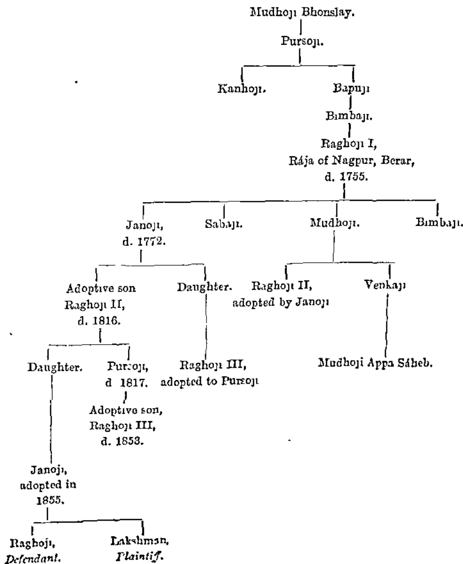
APPEAL from a decree (14th November 1907) of the High Court at Bombay, which affirmed a decree (7th December 1904) of the Subordinate Judge of Poona.

The suit which gave rise to this appeal was instituted on 22nd August 1900 by Lakshmanrao Sáheb, the present respondent, for partition of certain properties in the Ahmednagar, *Poona*, Sholápur and Sátára Districts of the Bombay Presidency, alleging that they constituted ancestral property of the family

partible equally between himself and his elder brother, the present appellant, whom he made defendant.

The defence of the appellant, who was in possession, was that all the properties had devolved upon him as Rája of Deur and head of the family and were impartible not only by custom, but also by reason of the nature of their tenure.

The parties are the only surviving male representatives of the Nágpur Branch of the Bhonsle family, and their pedigree so far as it was material was as follows :—



1912.

RAGHOJIRAO SAHEB v. LAKSHMANRAO SAHEB.

Raja Janoji, the father of the parties, died on 5th December 1881 leaving him surviving three widows, three daughters, and two sons—the plaintiff and the defendant who were then minors, the elder of them, the defendant being only nine years old. At the time of Raja Janoji's death, there were heavy debts outstanding against the estate amounting to about Rs. 3,80,000 in addition to the balance of Rs. 32,000 of the loan of 5½ lacs of Rupees made by the British Government This is shown by the report made by the Chief Commissioner of the Central Provinces to the Government of India, dated the 10th February 1882, in which he made proposals for the reduction and distribution of the amount of pension enjoyed by Raja Janoji among the surviving members of the family mentioned above. He also proposed the management of the estate by himself during the minority of the elder of the two sons of Raja Janoji, in order to enable him to take all possible measures of economy in the management of their family affairs with the view of liquidating the debts out of the surplus income and handing over the estate to the sons free from liabilities. These proposals made by the Chief Commissioner were sanctioned by the Government of India But it appeared that the management of the property was subsequently transferred to the Court of Wards in the year 1885. The defendant having subsequently attained the age of majority the whole of the estate left by Raja Janoji was handed over to him in 1893—and he managed it till August 1895, when, on the plea of his own incapacity to manage his affairs, he put it back with the sanction of the Chief Commissioner of Nágpur, under the Court of Wards. But at that time ill-feeling had arisen between the two brothers owing to the defendant's denial of the plaintiff's right of participation in their father's estate to which the latter asserted his exclusive right on the ground that it was confirmed to him alone for the maintenance of his dignity as the head of the family. But subsequently the Government of India having by letter No. 3640-I. B., dated 24th September 1897, in reply to the defendant Raghoji's petition forwarded to them by the Chief Commissioner, declared the whole of the estate, including both lands and jewels, save Deur lands which were attached to the title of Raja of Deur conferred upon him personally as the head of

the family, to be partible according to Hindu Law and Maratha custom. The defendant would appear to have yielded to the plaintiff's demand of his share only in the estate in the Central Provinces, North-Western Provinces and Berar. Accordingly they agreed to have it divided by an arbitrator appointed by them, with the consent of the Deputy Commissioner Mr. Mayes and referred the matter to the arbitrator by the agreement dated 3rd May 1899 That estate had, it was admitted, been divided between the two brothers and the present dispute related to the remaining estate in the Bombay Presidency which was not included in the reference to arbitration as the defendant still persisted in denying the plaintiff's right to a share in that property on the plea, *inter alia*, that it, being an appanage of the title of Raja of Deur conferred upon him, was impartible.

The present suit was then brought as above stated, and the Subordinate Judge held that the defence was established with regard only to such of the properties as were situated in the district of Sátára; as to the rest of the properties he passed a decree in favour of the plaintiff for partition.

An appeal to the High Court was heard by JENKINS, C. J., and KNIGHT, J., who affirmed the decree of the Subordinate Judge. The judgment was as follows:—

"This is a suit brought by a cadet of the house of Nágpur Bhonsles to enforce against his elder brother, the titular Raja of Deur, partition of that part of the family estate which lies within the Bombay Presidency. It consists of grants and allowances derived from villages in the Poona, Sholápur and Ahmednagar Collectorates The Deur *Saranjám* in the Sátára District, which also pertains to the family, was at first included in the plaint; but plaintiff has abandoned this portion of his claim, admitting that the *Saranjám* is the peculiar appanage of the hereditary title, and that it is not liable to partition. Defendant asserts that the other properties enumerated are also part of this appanage; and with this the whole present dispute is defined All that the Court is required to ascertain is whether the Poona, Sholápur and Ahmednagar grants are part of the general family property and liable as such to partition among co-parceners, or whether they are included in the special *Saranjám* assigned by Government for the maintenance of the title, and are therefore impartible.

"Glancing for a moment at the question of jurisdiction which necessarily arises in claims of this character, we note that the learned Advocate General has admitted the competence of the Civil Courts to deal with this suit. By clause 16 (a) of Act II of 1863 the power is reserved to the Government to determine the conditions

1912.

Raghojirao Saheb v. Lakshmanrao Saheb.

of the devolution of estates granted on political tenure; and if in this case the Government had chosen to demur to our jurisdiction it might be that we should have had to decline to entertain the suit. But not only has the defendant waived this ground of defence, but Government themselves, as is apparent from the papers before us, have assented to the submission of the dispute to our decision, and have more particularly granted to plaintiff those certificates under the Pensions Act without which his suit could not lie. The case therefore resembles that of *Narayan Jagannath Dikshit* v. *Vasudev Vishnu Dikshit*(1) which like this, related to a grant in *saranjám*; and we need make no further allusion to the question of jurisdiction. The Government have preferred to leave the dispute to the decision of the Civil Courts, and it is for us therefore to construe the terms of the grant, gathering its meaning from the surrounding circumstances and the object with which the *sanad* was granted (*Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit*).

"The history of the Nagpur Bhonsles is set forth in the clear and able judgment of the Subordinate Judge, Mr. Bhave(2). The head of the family was at one time the Raja of Nagpur, a title which he seems to have attained during the troublous times of the latter part of the 18th century, and which was extinguished by the British Government about the year 1853. From the older records produced in evidence it appears that none of the grants under which the property in the Bombay Presidency was acquired can be traced back beyond the year 1752. To deal with each section of them in turn: the documents noted in the margin show that in 1752 the villages of Nimbgaon and Jat Devoli, in the Ahmednagar Collectorate, were held by the first Raghoji in *jaghir*, apparently under grants from the Nizam, and that the territory then being ceded to the Peshwa, the *jaghir* was resumed by the new Government and re-granted to him. He died in 1755 and in 1760 the estate was granted afresh to his eldest son Janoji (under Exhibit 407) who seems to have held it until his death in 1772. Here the history breaks off, and no documentary evidence is forthcoming until 1858, when the Inam Commissioner investigated the grants, and decided that there was nothing to suggest that the villages were ever held on an hereditary tenure (Exhibits 423, 425).

Exhibits 397, 407, 404 406, 405.

"Nextly as to the village of Jalalpur, also in Ahmednagar. The history is very similar to that of the preceding property except that the earliest paper on the record indicates that in 1774—Janoji being dead—the village was held by Raghoji I's second son, Sabaji. (The Inam Commissioner, writing in 1858, (Exhibit 424) refers to the original *sanad*, not now before us, whereby the village was granted in *jaghir* to Sabaji in 1772, presumably just after Janoji's death.) The other old papers loosely refer to Raghoji I as the grantee—at a date when he had been dead 20 years or more and save that they speak of the grant as a *jaghir*, they possess no

Exhibits 259, 396, 398.

(1) (1890) 15 Bom. 247.

(2) See Sir W. Grant Duff's "History of the Marathas" (3rd Ed.) 108 *et seq*. and the "Report on the Territories of the Raja of Nagpur" (1827), by the British Resident, Mr. Richard Jenkins.—*Reporter's Note.*

special importance. The conclusions of the Inam Commissioner (Exhibit 424) with reference to this property were identical with those indicated in the last paragraph.

"Lastly as to Hingani in the Poona District The two oldest papers, of 1763 and 1769 respectively, show the village as 'held by' Janoji, the nature of the tenure not being specified, but two others, of 1775, speak of the grant as a *jaghir* held by Raghoji, presumably meaning the original grantee. In 1796 the name again appears, when it may refer either to Raghoji I or to his grandson, the child of his third son Mudhoji who had died in 1788. The Inam Commissioner's report on this grant has not been laid before us.

Exhibits 403, 402, 396, 399, 398.

"The conclusions to be drawn from this portion of the evidence are simple and obvious. The documents produced are not so complete as those at the disposal of the Inam Commissioner in 1858, many important papers to which he refers, especially in connection with Jat Devoli, Nimbgaon, and Jalalpur, not having been put in evidence, and we do not feel at liberty to proceed upon his second-hand account of their contents But on the materials before us we feel no hesitation in endorsing his conclusions as regards the three villages just named, and in framing similar conclusions for ourselves as regards the fourth The grants were manifestly grants in *jaghir* of the ordinary character, that is to say, they were personal and not hereditary, and were resumable at pleasure Being personal and temporary they were necessarily impartible Long after the advent of the Maratha power, the Hindustani term *jaghir* continued to be applied to them, carrying with it its usual connotations and implying a grant not of the soil but of the revenue, and one personal to the grantee (*Gulabdas Jugjivandas* v. *Collector of Surat*(1)). At what date the term was replaced by its Maratha equivalent, *saranjam*, is not disclosed by the evidence, but there is nothing to suggest that the change was anything but a mere change in nomenclature That the grant was never hereditary is the ordinary presumption from the fact that it was a grant in *jaghir* (*Gulabdas Jugjivandas* v. *Collector of Surat*(1), and *Ramchandra* v. *Venkatrao*(2)), and is moreover directly proved by the re-grant of Nimbgaon and Jat Devoli to Janoji in 1760 under the *sanad* (Exhibit 407). We do not think that the circumstance that the grant was generally, or even invariably, continued to the senior living male of the family is by itself adequate to rebut the presumption or discredit the inference. There is no direct evidence that the grant was ever intended to be hereditary, and there is much to suggest the contrary. That in those times of turmoil and disturbance the ruling power should for 40 or 50 years have secured the support of the local Chieftains by continuing their eldest males from time to time in the enjoyment of their military emoluments, is no more than natural; and in the later unsettled days that preceded the introduction of the British Power, it is no secure ground for inference that the descendants of the original grantees should have contrived to maintain their hold upon the revenues that their fathers had enjoyed. We must therefore discard the plea that the history of the *jaghirs* indicates an hereditary grant and the further suggestion that they descended by right of primogeniture must necessarily fall to the ground.

(1) (1878) 3 Bom. 186 : L. R. 6 I. A. 54. (2) (1882) 6 Bom. 598.

1912.

RAGHOJIRAO SAHEB
v.
LAKSHMANRAO SAHEB.

"We are now in a position to approach the argument laid before us on behalf of the defendant-appellant by the learned Advocate General. After the extinction in 1853 of the title of Raja of Nagpur, and the proceedings of the Inam Commissioner in 1858, the whole of the grants were declared to have lapsed, save in so far as a portion of them was continued during the life-time of certain widows. Under the circumstances and on conditions which we will presently examine the estate was re-granted to the family by Government in 1861-62; and the learned Advocate General has contended that, in accordance with the well established principle which affirms that the continuance or revival of an ancient grant must be presumed to imply a continuance of its original terms, conditions, and limitations except in so far as they are explicitly or impliedly varied, the regrant must be deemed to be no more and no less than a renewal of the estate enjoyed by the Bhonsles in 1752—1796. The conclusions which we have just enunciated as to the character of that estate deprive the argument of much of its value for the appellant's case largely rests upon the assumption that the original grant was a grant in heredity descending by primogeniture However although it may not originally have been hereditary, there is no question but that it has become so under the terms of the modern regrant, and, spelling a rule of descent by primogeniture out of the earlier history of the grant, it is possible for the defendant to argue that the intention of the regrant was to recognise and affirm that rule, and to confine the estate to the senior male—or as he himself puts it, the senior branch,—of the family. The argument derives a more particular plausibility from the fact that when the estate was regranted, part of it was admittedly attended by this very condition of descent by primogeniture and the question that we now have to determine is whether the properties in suit were included within that part.

"In 1858-60 as we have seen, the Government, acting upon the reports of the Inam Commissioner, declared the whole estate to have lapsed, the Poona and Sholápur properties being permitted to continue in the possession of certain widows until the death of the last survivor This continuance had been sanctioned as a matter of grace, not of right. It happened however that one of the ladies, Bakabai, had rendered valuable services to the Government during the Mutiny: and in recognition of those services the Government was pleased to regrant the whole estate to the family and to revive the royal title, the latter dignity however deriving not from the old Chieftaincy of Nagpur, but from a village in the Sátára District called Deur. With the recognition of the title, Government specially allotted an estate called *the Deur lands*, or the *lands of* or *attached to Deur*, to form the territorial basis of the Rajaship and to supply a permanent appanage to its dignity. It is the case for the appellant that this special estate comprised and included the whole of the properties situate within the Bombay Presidency.

"It is necessary, we think, to lay particular stress upon the terms of the new grant, and to note the essential differences that distinguished it from the original The latter was intended, as all *jaghirs* were, rather for services to be rendered than for services already rendered; it was personal, it was not hereditary, and it was not, so far as the papers before us enable us to speak, accompanied by the bestowal or recognition of any royal title. The new grant was for the reward of special and recent services, and bore no reference to the future; it was a grant to the heirs

of the then Chief as well as to himself, and it conferred upon him the hereditary title of Raja These are the words in which it was embodied (Exhibit 481): 'Whereas it has been satisfactorily proved that the Maharani Bakabai Saheb *rendered great assistance to the British Government* at the time of the Mutiny, the Governor General is pleased to confer on this good occasion upon the Raja himself and his heirs, begotten or adopted, in perpetuity the title of Raja Bahadur of Deur, and to release to himself and his heirs and successors in perpetuity the lands attached to Deur free of revenue.'

"This document bears date in 1861 It was confirmed by the Secretary of State in the following terms in 1862 (Exhibit 409) 'The continuance to the present representative of the *Bhonsla* family of the *vatans* and *saranjams* held by them in the Bombay Presidency notwithstanding the fact that under rules in force they would have lapsed to the State, is a measure which will be gratifying to this loyal family, and one which I have much pleasure in confirming '

"*The grant, however, seems to have left room for doubt as to its precise extent,* more especially, we may conjecture, in reference to the estates previously continued to the widows in Poona and Sholápur, for in 1864 the Government of India replied to an inquiry from the local Government in the following terms (Exhibit 33): 'I am directed to reply to your letter No. 4408, dated 9th December last, to inform you that His Excellency the Governor in Council of Bombay is right in supposing that *all* the possessions specified in the list accompanying the memorandum from Revenue Commissioner, Southern Division, No 3726, dated 4th November last, are to be continued hereditarily to Janoji Bhonsle and his heirs without further inquiry '

"The emphasis is evidently on the *all.* The particular importance of this document lies in its reference to a certain list. This list evidently must have been—it has been conceded before us that it was—the list drawn up by the Inam Commissioner in 1858, now in evidence as Exhibit 437. It is a 'statement showing every alienation of revenue entered in the public accounts in the name of His Highness Raghoji Bhonsle, the late Raja of Nagpur,' and its special significance lies in the fact that of the eleven properties that it contains, one, and one only, the Satara Estate of Deur, is entered as held on *saranjam* tenure, while all the others are shown as *inams or vatans.*

"Now these are the only documents of prime authority relating to the grant, and they must be read as a whole The third, which is evidently explanatory and definitive of the other two, we must regard as conclusive both as to the extent and as to the character of the regrant. It explicitly proceeds upon the basis of the list, Exhibit 437, and, in the absence of all evidence to the contrary, it must be taken to continue the *inams* therein detailed in the specific character assigned to each by the list. The *saranjam* is continued as *saranjam,* the *inam* as *inam,* the *vatan* as *vatan*: save that all are rendered hereditary, there is nothing to indicate or suggest a change in *the character of any. From this it must follow that it* was the Satara property alone that was regranted on the impartible tenure.

"Counsel for the defendant has taken exception to the evidentiary value of the entries in this list, so far as they define the character of the tenures, by pointing

both by custom, and by reason of the nature of their tenure; and they constituted (together with small estates in Sátára which are not now in question) the appanage of the Rája of Deur, a title of which the appellant was the present holder, and were consequently impartible. Under the circumstances of the case there was no presumption that the lands in dispute were not heritable up to 1853 when Raghoji III died; the presumption, it was submitted, was that they were heritable. Reference was made to the case of *Gulabdas Jugjivandas* v. *Collector of Surat*[1], which it was contended did not govern the case on that point as the High Court had wrongly decided. On that part of the case the Subordinate Judge was right on the evidence and under the circumstances of the case in holding that the lands in question were heritable up to 1853, and the High Court had rightly held that they were impartible They were also by custom subject to the law of primogeniture. On the regrant by the British Government the lands which were previously impartible did not become the partible lands of the grantee's family. The lands were held on the old conditions unless any change in their tenure was expressly made. It was not shown from the "List" of the Inam Commissioner or by any admissible evidence that the intention of the re-grant was that the lands granted should be partible An "inam" was in Bombay a permanent grant. The grant of 1862 had been wrongly interpreted by the High Court. Reference was made to *Krishnarav Ganesh* v. *Rangrav*[2]: *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*[3]: *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*[4]. The Inam Commissioners Act (XI of 1852) and Rules 3 and 6 of the Rules made under that Act: and *Shekh Sultan Sani* v. *Shekh Ajmodin*[5].

De Gruyther K. C., Ross and *G. K. Gadgil* for the respondent contended that the lands in dispute were, as had been concurrently held by the Subordinate Judge and by the High

(1) (1878) 3 Bom 186: L. R. 6 I. A. 54.

(2) (1867) 4 Bom. H. C. R. (A. C. J.) 1 (7, 9).

(3) (1867) 12 Moo. I. A. 1 (35).

(4) (1881) 3 Mad. 290: L. R 8 I. A. 99.

(5) (1892) 17 Bom. 431: L. R. 20 I. A. 50.

Court, partible and not impartible property, and therefore did not form part of the "lands attached to Deur," referred to in the Sanad of *10th October 1861*, which had been rightly construed by both the lower Courts. The question was what were the "lands attached to Deur." "Saranjam," "Inam," and "Watan" were all separate and distinct tenures. "Mokasa" had the same meaning as "Saranjam." Reference was made to *Shekh Sultan Sani* v *Shekh Ajmodin*[1]: Aitchison's Treaties (1st Ed 1863), Vol III, pages 93, 94: Inam Commissioners Act (XI of 1852): Bombay Act II of 1863: *Vinayak* v. *Gopal Hari*[2] showing lands granted on "inam" tenure by the Peishwa were considered to be liable to partition: *Adrishappa* v *Gurushidappa*[3]· Nairne's Handbook of Revenue for the use of Revenue Officers, page 490· Rules revised by Government of Bombay in Bombay Gazette, 19th May 1898: *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*[4]: *Gopal Hari* v *Ramakant*[5] *Krishnarav Ganesh* v *Rangrav*[6] *Ramchandra* v *Venkatrao*[7] *Ramkrishnarao* v. *Nanarao*[8]: *Gulabdas Jugjivandas* v *Collector of Surat*[9]: Land system of British India by B. H. Baden Powell, Vol. III, Book IV (Ed 1892), pages 299, 303· and Land Revenue in British India, by the same author (Ed. 1853).

Kenworthy Brown replied.

1912, July 18th·—The judgment of their Lordships was delivered by—

Lord Shaw.—This appeal is made against a decree of the High Court of Justice at Bombay, dated the 14th November 1907, which affirmed a decree of the Subordinate Court of Poona, dated the 7th December 1904. The plaintiff (respondent)

(1) (1892) 17 Bom 431: L. R. 20 I. A. 50.

(2) (1903) 27 Bom. 353 (356, 357): L. R 30 I. A. 77 (78, 79).

(3) (1880) 4 Bom. 494: L. R. 7 I. A 162.

(4) (1881) 3 Mad. 290: L. R. 8 I. A. 99.

(5) (1896) 21 Bom. 458 (460).

(6) (1867) 4 Bom. H. C. R. (A. C. J.) 1 (2, 4—9, 11, 13, 17, 21, 22).

(7) (1882) 6 Bom. 598.

(8) (1903) 5 Bom. L. R. 951.

(9) (1878) 3 Bom. 186: L. R. 6 I. A. 54.

1912.

Raghojirao Sahib v. Lakshmanrao Sahib

and the defendant (appellant) are brothers. The main object of the suit is contained in the first prayer of the plaint, and is to have it declared that the whole of the immoveable and moveable estate mentioned in the schedule annexed to the plaint belongs to these two brothers as equal owners thereof. The elder brother, the defendant-appellant, is Rájáh of Deur. And the claim is resisted by him upon the ground that the various properties referred to had been succeeded to by him, under the law of primogeniture, as an appanage to the title of Rájáh conferred upon him by a Sanad issued under the hand of the Governor General, Earl Canning, in the year 1862.

The properties are situated in the districts of Poona, Ahmednagar, Sátára and Sholápur, all in the Presidency of Bombay. They include five *mouzahs* or villages, together with various *vatans*, *hakks*, and cash allowances, set forth in the schedule It was matter of agreement in the High Court that the main question in the case should be treated as one applicable to the villages or *mouzahs*, and that when the question of partibility or impartibility should be settled in regard to them, the remaining items in the schedule should follow that decision.

Of the *mouzahs* mentioned, that of Deur is situated in Sátára. In the course of the proceedings it has been admitted that the property in the Sátára District is an appanage of the title of the Rájáh of Deur, is impartible, and is succeeded to along with the title and position of Rájáh accordingly, that is to say, by the rule of primogeniture. It is submitted by the appellant that the same result should have followed with regard to the rest of the properties in dispute. The question in the case is whether that submission is correct.

The whole of the properties are, as stated, within the Bombay Presidency. This fact throws light upon the construction of many of the official minutes, despatches, entries and orders, referred to in the case, and appears to be one of cogency. It can hardly be denied that the language used in all these official documents for a period of about fifty years is at least *ex facie*

language applicable to the possession of the Rájáh in the Bombay Presidency as a whole 191[illegible]

Points of great historical interest are naturally suggested by a review of the pedigree put in by the parties The records of the Bhonsle family—the Rajahs of Nagpur—are bound up during a long period of time with many stirring adventures and achievements in the course of the Marátha ascendancy and its decline. The position of the family was one of great note from the middle of the 17th, and during the whole course of the 18th, and the first half of the 19th centuries. The possessions of these Rájáhs were extensive, stretching throughout many portions of the Central Provices, the North-West Provinces and Berar, as well as of the Bombay Presidency.

The last of the Rájáhs of Nágpur, Raghoji III, held the title, estates and rights from the year 1817 till his death in 1853. The forfeiture of 1818 followed by the treaty and free gift of 1826 need not be referred to, the facts of ownership and possession being substantially as stated He died without issue. He himself was an adoptive son of one Pursoji Bhonsle, and with his death in these circumstances the Bhonsle dynasty of Nágpur came to an end. It is an admission of parties that in that year the title of Rájáh of Nágpur lapsed and that the estates and rights of the deceased Raghoji III fell to the British Government.

The widows of Raghoji, however, adopted Janoji in the year 1855. He survived till 1881, leaving behind him the two sons who are contestants in the present case.

During the Mutiny of 1857 a female member of the family, the Rani Baka Bai, appears to have powerfully and loyally assisted the British cause and to have rendered services worthy of official recognition. She was the widow of a former Rájáh of Nágpur, namely, Raghoji II., and she was anxious for the continuance in the family of the title of Rájáh and the attachment to it of such property as would mark and maintain its dignity. The Government of the day declined to restore the Nágpur title, but was willing to create—by Sanad issuing from the Governor General—a fresh Rájáhship. The title

pitched upon was derived from Deur, a small village in the Sátára District of the Bombay Provinces. It is manifest from the official documents issued that it was one of the objects of the Government to make such a provision—in land and revenues accompanying the title—as, though small and unimportant if viewed relatively to the ancient Nágpur possessions, would still be sufficient to gratify, so far, the desire of Baka Bai, and to support in becoming dignity the newly created title.

It is accordingly important to note what were the exact terms of the Sanad under the hand of Earl Canning, Governor General. It is dated the 10th October 1861 The Subordinate Judge of Poona has closely examined it and the translations. As stated by the learned Judge, it is written in Urdu, and its text is as follows, it being super-signed by Lord Canning and bearing the seal of the Government of India :—

"Sanad granted by His Excellency the Viceroy and the Governor General of India in Council to Raja Janoji Bhonsle Bahádur conferring upon him the title of Rája Bahádur of Deur

"Whereas it has been proved and verified that Maharani Bakabai Saheb was loyal towards the noble British Government and the good behaviour and loyalty of that family during the Mutiny has been proved and verified, in recognition thereof the title of Rája Bahádur of Deur together with the lands attached to Deur has been conferred upon and given on this auspicious occasion to that Meherbán himself and his heirs in succession whether begotten or adopted in perpetuity and the Sanad thereof has been executed. It must be deemed incumbent that in return of this gift and kindness you will always remain loyal to the noble British Government and you will look upon this Sanad a perfect one "

The point of the case is: What meaning is to be given to the words "lands attached to Deur"? Are these lands limited to the village of Deur itself? Or do they extend to the possessions in the Sàtára District? Or do they cover the possessions as a whole which lay within the Presidency of Bombay?

Neither party to the case maintains that the grant should be confined to the lands in the village of Deur alone; and it is conceded by the respondent that other lands in the Sá tára District must be held to be included. This concession is

perfectly reasonable, for otherwise the lands attached to Deur, if confined to the village of Deur itself, would reduce the maintenance of the dignity of the Rájáh almost to a shadow.

But the mere inclusion of all the Sátára lands also reaches a very inconsiderable total These lands are worth over Rs. 3,000 per annum. The villages, lands, and others, in the whole of the Bombay Presidency, mentioned in the plaint, yield a total revenue of over Rs 12,000, and it would appear from this, that if all these lands were dealt with as lands which were attached to Deur by the Sanad, they would form taken together a fund for the maintenance of the dignity of the Rájáh which could not be said to be over ample. But if the lands attached to Deur are confined to those in the Sátára District alone, then the result of such a construction of the Sanad is to set up this Rájáh with an appanage of about Rs. 3,000 per annum for the support of his dignity and title Their Lordships are not surprised to learn that during all the years since the Sanad, in many of which the Court of Wards have had possession, and in all of which the Government have had cognizance of the facts, no one apparently until the institution of this suit ever thought of maintaining that the possessions attached to the position of Rájáh were of the slender proportions described. Upon the contrary, they have throughout been dealt with as those within the Bombay Presidency at large.

As mentioned, the properties of the former Rájáhs were situated not only in the Bombay Presidency, in which their extent was very limited, but in the Central Provinces and Berar. A large donation or stipend of Rs. 1,20,000 per annum was enjoyed by the late Rájáh Janoji at the time of his death. After that event, in 1881, the Government of the day had to consider the question of the allowances to be made to his successors, namely, his two sons A pension amounting to Rs. 90,000 was fixed, and in the despatch of the 10th February 1882, by the Assistant Secretary to the Chief Commissioner, the grounds are explained of the distribution of this pension. "The two sons," it is said, "will succeed to the landed property of the late Rájáh in the Central Provinces and Berar and to

OJIRAO HEB v. MANRAO HEB.

the personalty in equal shares. This is in accordance with the Hindu Law and Marátha custom. The elder son will succeed to the title of Rájáh of Deur and to the estate in the Bombay Presidency, which goes with that title. The value of this estate is, however, comparatively small, the bulk of the landed property of the late Rájáh being situated in the Central Provinces and Berar There will not, therefore, be much difference in the private income of the two sons should they hereafter separate." This passage is quoted as an indication of the view which is repeatedly exhibited in the documents with regard to the attitude of the Government, from whom the grant by way of Sanad proceeded This interpretation was undoubtedly that the Rájáh of Deur should take the estates in the Bombay Presidency, which were comparatively small, as an appanage of the title; that these should accordingly follow the rule of primogeniture; whereas the larger and more important estates in the Central Provinces and Berar should be partible equally between the two sons.

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. But in the present case their Lordships do not feel themselves able to reject the assistance which it affords. The Sanad upon which these important rights are founded is a document of a general and informal character. It admittedly is capable of a variety of constructions. The extreme literal construction—its confinement to the single village of Deur – is adopted by neither party And when the ambiguity covers the geographical and pecuniary extent of an admittedly ambiguous grant, their Lordships think it legitimate to observe what was the footing upon which the grantors, namely, the Government and its successors and officials, from the date of the grant and for a long period of time, proceeded.

It may be pointed out that since 1881, namely, since the death of Janoji, the question of partibility was, of course, practically and sharply raised, and the fact is that the whole of the income derived from the estates in the Bombay

Presidency, amounting to about Rs. 12,000 per annum, has been uniformly treated as the exclusive income of the elder son, namely, the present appellant. This was done both while he and his brother were wards in the Court of Wards and at other times. That Court managed the possessions of the appellant until he came of age in 1893. Again in 1895 the Court of Wards re-entered, by request of the Rájáh, into possession and management for a time. In 1899 the younger brother came of age, the property in the Central Provinces and Berar was divided equally, and the Bombay estate was treated as impartible and continued with the Rájáh as an appanage of the title In the opinion of their Lordships, this throughout was a correct course, and the present suit, the object of which is to diverge from that course, is not in accordance with the rights of parties.

In one view, what has been said might appear to be sufficient for the disposal of this case But in the judgments of the learned Judges of the Courts below, and in the arguments addressed to their Lordships, further considerations were urged as assisting towards a conclusion and falling to be dealt with. There can be little doubt that the whole of the lands in issue were originally *Jaghir* lands, and the legal position of such property *quoad* succession, and the competency or incompetency of assisting the construction of the Sanad of 1862 by such considerations, were much discussed. There are three points with reference to the position of property such as that now in suit which stand logically clear of each other, and with regard to which there has been a certain element of confusion. These three points are, first, was the land impartible? Secondly, did the law of hereditary succession apply to it? And thirdly, was it subject to the law of primogeniture?

The Subordinate Judge, after referring to the fact that some of the villages are referred to as *Jaghirs* in the old records, is of opinion that "that fact *per se* is not sufficient to make them impartible." If this be stated as a conclusion with regard to the *Jaghir* tenure in general, their Lordships cannot agree with it; but, upon the contrary, they are of

opinion that the following statement in the judgment of the High Court is correct, namely, "The grants were manifestly grants in *Jaghir* of the ordinary character, that is to say, they were personal and not hereditary, and were resumable at pleasure. Being personal and temporary, they were necessarily impartible." This accurately distinguishes between partibility as such, and any consequence, whether in the direction of hereditary or primogenital succession, which may be supposed to flow from such a fact The impartibility of *Jaghir* lands is in truth entirely separated from the idea of succession by the fact that the impartible lands were held together as a unit in the hands of one man who was rendering personal service to the Government of the day. It may be that upon his death a fresh grant, again to one man, and again in return for personal service, was made; and it may also be that the one man selected was in the ordinary case the eldest son; but these matters of practice were not consequences of law, and the impartibility and unity which attached to personal service was not related to, but, on the contrary, was distinct from, the idea of succession by force of law to the impartible lands.

It is at this point that the case appears to have been confused and encumbered by a plea put forward by the appellant to the effect that the lands in question were not only impartible and hereditary, but were, by custom, subject to the law of primogeniture. Once grant that the lands were *Jaghir* and impartible as such, a custom of the kind alleged was not a subject for proof, because such a custom would have been radically inconsistent with the personal and non-transmissive character of a grant in *Jaghir*. Their Lordships agree in holding with the Courts below that this case accordingly cannot be decided on the custom alleged.

All that remains on this issue, consequently, is the fact that prior to the regrant by Earl Canning the lands had been formerly *Jaghir*. But this term implied no grant of the soil, but a personal grant only of the revenue to the grantee. The *Marathi* equivalent to the term *Jaghir*, namely, *Saranjam*,

came in course of time to be applied to the lands, and no doubt it was also a fact in the history of the property that the senior living male of the family had in the ordinary case succeeded to it.

In those circumstances, it is interesting to observe what was the delivery order issued with reference to the lands which were the subject of the Sanad This forms a not unimportant item to that *contemporanea expositio* to which reference has been made. Much importance—and, in their Lordships' opinion, too much importance—has been attached in the judgments of the Courts below to the distinction between the term *Inam* and *Saranjam*. The importance has reached this point, that the learned Judges treat the lands of Satara as referred to in one or two of the documents as *Saranjam*, by way, as they apprehend, of distinction from the other lands which are treated as *Inam*. In their Lordships' view, the terms are not mutually exclusive in the sense indicated. The latter term, namely, *Inam*, is one of mere generic significance, applicable to a Government grant as a whole. But in the next place it is a very striking fact in this case that in the initial delivery order now being referred to (as indeed in many of the subsequent documents) the rights in the Bombay Presidency are dealt with comprehensively and as covered, not by one name, but by all, or at least many, of the names applicable to land and revenue rights. In the Mamlatdar's order, for instance, of the 19th March 1862, applicable to the village of Moujo Devi Nimbgay, one of the properties in Ahmednagar, the matter is treated of in this way. The village "is a jaghir to the Bhonsles and as a village was placed under japti (attachment); the revenue of the same was received for being credited in Government records." Then follows the definite statement :—"But the Vatan, Inam, Saranjam, Hakks, &c. . . . have been entered in the name of Janoji . . ." Therefore certain definite orders are given pursuant to the Government Resolution, "directing the said village, Vatan, &c., to be delivered" into the charge of Janoji's managers. It would therefore accordingly appear that the term *Saranjam* was not in point of fact confined to the lands of Sátára. This

ground of the judgments of the Courts below accordingly disappears.

A matter of much significance must now be dealt with. On the death of Janoji in 1881 the question of partibility or impartibility,—there being two sons of that Rájáh,—became matter for definite consideration and regulation. What light is thrown upon the case by the conduct at and after this juncture of the Government, including the Court of Wards, which was charged with the correct distribution of these two sons' shares? Upon this head their Lordships do not conceal that they have viewed with some dissatisfaction the conduct of certain parts of the plaintiff's case. On the 6th May 1882 an important letter was written by Mr. Lawrie, manager of the estates, to the Deputy Collector, "Sátára, Sholápur, Ahmednagar and Poona" That is to say, this letter was addressed to the persons acting as Collectors in reference to all the estates within the Bombay Presidency which were the subject of issue in this case He forwards his appointment by the Deputy Commissioner of Nágpur as manager of the estate of the late Rájáh's minor sons; and then there follows this passage, or what was supposed to have been this passage, as the document was produced in the suit: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rájáh in your collectorate in favour of his two sons, Rájáh Raghojeerao Bhonsle (only for Satara) and Laxmanrao in equal shares with my name as manager." So stated, this document would appear to suggest that all the properties except that of Sátára were partible; and this would have been an important adminicle of evidence to that effect. The document, however, has a history. It is deponed to in the evidence of the plaintiff's own witness Abaji Belaji. Interlineations and remarkable alterations occur in the document, and the witness confesses, "I cannot say why and by whose order the words 'only for Sátára,' 'two,' the 'S' added to the word 'son,' and the words 'and Laxmanrao in equal shares with my name as manager' were written." As the document stands it suits the plaintiff's case; but it appears to be legitimate, and, indeed, proper and

just, to read the document without the doubtful and unexplained interlineations and alterations. So read, the letter is as follows: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rájáh in your collectorate in favour of his son Rájáh Raghojeerao Bhonsle." The letter is addressed to the Collector, not of Sátára alone, but to the Collectors of Sátára, Sholápur, Ahmednagar, and Poona, and it would, so read, accordingly appear to demonstrate that at the important time when the administration of the deceased Rájáh Janoji's estate was taken up by Government, all the estates in the Bombay Presidency were treated, without exception, as an appanage to the title of Rájáh.

It is right that a further reference should be made to a cognate topic. It would rather seem that the learned Judges of the Courts below have been induced to treat as authentic various entries in the Collector's books which were not the entries as originally made, but were entries subject to "correction;" a correction made upon an *ex parte* application on behalf of the plaintiff This application was preferred, and apparently granted, behind the back of the defendant, and during the course of this present litigation. The date of the suit was the 22nd August 1900, and on the 5th August 1901 a memorial was presented to the Governor in Council at Bombay with the statement: "This is forwarded to the Chief Secretary by letter of the 13th August 1902." It is plain from a perusal of these documents that certain registers, including in particular the register of the Collector of Ahmednagar, together with certain despatches, had been the subject of investigation on behalf of the plaintiff, and that that investigation had revealed facts which were considered to be contrary to his interests. The application admits that in these documents the Collector of Ahmednagar had "been directed to treat the villages referred to in the petition as impartible *saranjám*." Then the letter proceeds: "The villages of Devi Nimgaon, Jat Deola, and Jalalpur, in the Ahmednagar District, were up to 1864 regarded as *Ináms* and *Saranjáms*, and the *Deshmukhi* and

other *Hacks* as *Wattans*, as contradistinguished from *Saranjáms.* There was and is no room for asserting that they were ever treated as impartible *Saranjáms* held on political tenure." This remarkable document winds up thus: "In view of the facts and arguments above set forth, you will be pleased to issue orders to correct the Land Revenue Register by expunging that portion of it in which" the villages "are specified as political *Saranjáms*." The facts and arguments here referred to are simply those which have been urged in the present litigation The one fact outstanding from the whole of these proceedings is that the argument now preferred, to the effect that the Sátára property and that alone was treated as *Saranjám,* while the other properties were throughout treated as *Inám*, is contrary to what is admitted to have been the original entries in the books referred to. In these circumstances, it appears to their Lordships to be quite unsafe to place reliance upon a denomination of these lands dependent upon a "correction" which appears, or is alleged, to have been made while the case was *sub judice,* and upon an *ex parte* representation. Their Lordships think that the original state of the Records before the so-called corrections were made was that alone to which a Court of Law should have looked. This would at least be the safe and ordinary rule, and there do not appear to be any facts in the present case to ground an exception to it. It is not for their Lordships to pronounce upon the procedure by which such "corrections" of official documents and records can be possible in those districts in circumstances such as are here disclosed.

Various difficulties are presented by reason of expressions which appear in despatches from those in authority in the Central Provinces. In those despatches language is used which would appear to signify that the lands attached to Deur in the Bombay Presidency were the Sátára lands alone. The language is not clear, and it had reference to a matter lying beyond the jurisdiction of the writers. Difficulties also arise with regard to the terminology employed in some of the entries in which *Saranjám* is applied to Sátára and *Inám* to the other

districts, whereas in others there appears to be an application of both terms to the same lands and in various districts. 1913.

RAGHOJIRAO SAHEB v. LAKSH SAHEB.

Their Lordships, upon the whole, have had little difficulty in coming to the conclusion that too restricted an application has been made by the Courts below of the term "the lands attached to Deur." They think the expression extends to the whole scheduled lands in the Presidency of Bombay. They will humbly advise His Majesty that the judgments of the Courts below should be reversed, that the lands referred to in this suit are impartible, that they are attached as an appanage to the title of the Rájáh of Deur, and that the suit should be dismissed with costs here and below.

The respondent will also pay the costs of a petition for further documents which was before the Board on the 24th February 1911.

Solicitors for the appellant: *Messrs. Speechly, Mumford & Craig.*

Solicitors for the respondent: *Messrs. Latteys & Hart.*

Appeal allowed.

J. V. W.